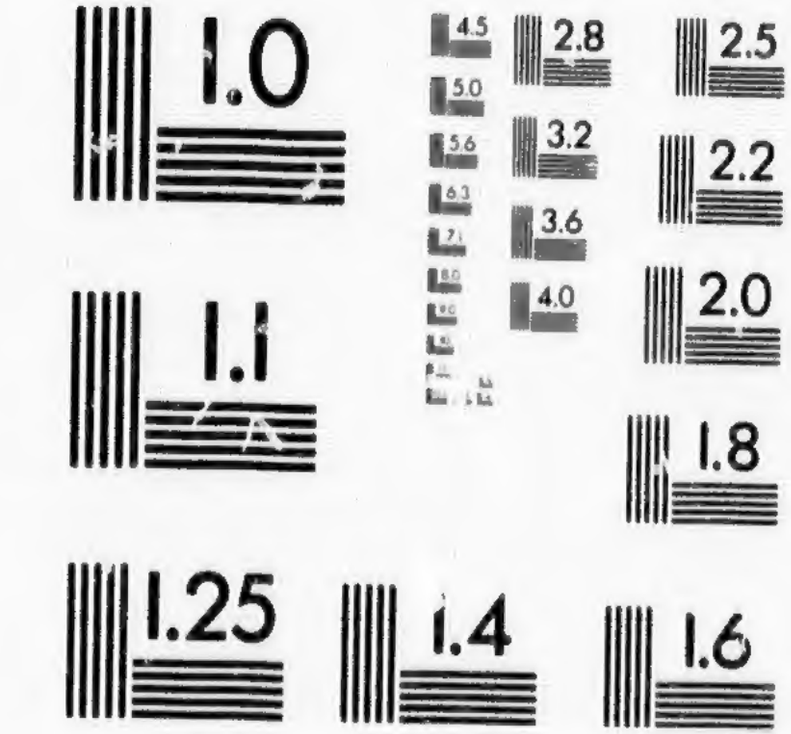
MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

Judge's Reasons.

MR. JUSTICE BAIN.

12th December 1892.

BAIN J. This suit has been instituted by the Plaintiffs with the object mainly, of obtaining a declaration from the Court that they have the legal right to the exclusive use for street railway purposes of the whole of the portions of Main street, Portage avenue and Kennedy street in the City of Winnipeg, on which they have been and are now operating their street railway, and an order or injunction to restrain the Defendant Company from operating street railways thereon.

The contention of the Plaintiffs, as regards these streets is, that by the By-law of the City of Winnipeg, No. 178, and the agreement made between them and the City in pursuance of this By-law they acquired, for the period mentioned therein the legal right to the exclusive use for street railway purposes of the whole of the portions of the streets laterally as well as longitudinally, which they should occupy with their railway, and that having so occupied the portions of these streets described in the Bill, the Defendant Company must be regarded as trespassers thereon, and should be restrained by the Court from interfering with the Plaintiffs' right.

Both the Plaintiffs and the Defendant Company, relying on the franchises they have obtained from the City, have invested a large amount of money in building and operating their street railways on Main street and Portage avenue, two of the main thoroughfares of the City; and important interests, both as regards the two Companies and the City of Winnipeg, are involved in the decision of the questions raised by the suit. The main question briefly is, whether or not the Plaintiffs have the exclusive right or monopoly of operating street railways on these streets for the period mentioned in their agreement? By the Act, 55 Vic., c. 56, the Provincial Legislature incorporated the Defendant Company and in the same Act validated and confirmed the By-law of the City of Winnipeg, under which the Company has built, and is now operating, railways in the streets of the City. It appears that this Act was passed by the Legislature with the full knowledge that the Plaintiffs were claiming to have the exclusive rights to the whole of the streets they occupied with their railway; and that passage of the Act was in fact opposed by the Plaintiffs before a Committee of the House. It is provided in Sec. 33 that,

> "Nothing in this Act or in the Schedule thereto shall in anyway affect or take away any right held by, or vested in the Winnipeg Street Railway Company [the Plaintiffs] if any such there be."

ject mainly, of
al right to the
rtions of Main
peg, on which
d an order or
street railways

s, that by the
made between
for the period
ilway purposes
dinally, which
ed the portions
st be regarded
om interfering

Franchises they
ey in building
venue, two of
as regards the
ecision of the
er or not the
et railways on
e Act, 55 Vic.,
any and in the
nnipeg, under
e streets of the
with the full
rights to the
passage of the
he House. It

ake away any
s] if any such

BAIN, J. But subject to this reservation, the effect of the Act is that the Defendant Company has been expressly empowered by the Legislature to construct and operate their street railway on Main Street and Portage Avenue, on which streets the Legislature knew the Plaintiffs were in occupation with their railway. The Defendants contend that in the fact of the legislative authority, which the Defendant Company has, the Court cannot, or at any rate should not, by the exercise of its extraordinary jurisdiction prevent the Defendant Company from exercising and enjoying the right which has been given to it and that the Plaintiffs, if they have the right they claim, should be left to enforce it in an ordinary action against the City. I am not prepared to say, however, that if the Plaintiffs can establish their right, the jurisdiction of the Court to interfere by injunction is taken away, for I apprehend that the rights given by the Statute to the Defendant Company were in effect given upon the condition that the plaintiffs had not a legal right to prevent the Defendant Company operating a railway in these streets. But it is very evident, I think, that before the Court can undertake to render the legislative grant the Defendant Company has received wholly nugatory and ineffectual, it will have to be satisfied beyond doubt or question that the Plaintiffs have the legal rights they claim.

Before it can be held that the Plaintiffs have the exclusive right they claim, it must be established, not only that the right has in fact been made over and granted to them by the City, but further that the conferring of such a right or franchise was within the corporate powers of the city; and the answer of the Defendants directly challenges both these propositions. The Plaintiffs, they say have not received from the City the exclusive right they claim, and if the City did undertake to give such a right it had not power to do so and its grant was invalid.

The expression in the By-law and Agreement,

> "and such railway shall have the exclusive right to such portion of any street or streets as shall be occupied by such railway"

is ambiguous, and it may be a question of some difficulty to decide what was the extent of the exclusive right granted, and I think it will be better, before construing the By-law and Agreement, to deal with the question of the power of the City to make such an exclusive grant as the Plaintiffs contend it did. If I come to the conclusion that the City did go beyond its powers if it gave the right contended for, then it will not be necessary for me to undertake to construe the By-law and Agreement.

Assuming, then, that the City did undertake to confer upon the Plaintiffs

the Defendant
construct and
on which streets
their railway.
authority, which
ate should not,
Defendant Com-
en given to it
ould be left to
prepared to say,
risdiction of the
that the rights
given upon the
the Defendant
vident, I think,
nt the Defend-
vill have to be
gal rights they

ght they claim,
made over and
uch a right or
answer of the
intiffs, they say
nd if the City
its grant was

treet or streets

cide what was
better, before
n of the power
tend it did. If
if it gave the
ake to construe

the Plaintiffs

the exclusive right they claim, the Defendants urge that the City could not legally give this right unless it had express authority from the Legislature to do so. The Plaintiffs' reply to this is that the express authority the Defendants demand is found in the City charter and in the Plaintiffs' Act of Incorporation, and furthermore they say that as the streets were vested in the City by its charter, it could give the exclusive right to use them, and that, at all events, as the Legislature has not expressly, or by necessary implication deprived the City of the power to give this exclusive right, the circumstances are such that, it must be deemed to have had the power as incident to the power expressly given.

There can be no question of the City having had full power to enter into an Agreement with the Plaintiffs authorizing them to build and operate street railways on all or any of the streets of the City. The provisions in section 154 of the City Charter would in themselves give this power, and the Plaintiffs' Act of Incorporation expressly authorizes the City

> "To grant permission to the said Company to construct their railways as aforesaid * * * across, along, and to use and occupy the said streets, highways or any part of them for that purpose, upon such condition and for such period or periods as may be respectively agreed upon between the Company and the said City."

This is express authority for the City to allow the Company to use its streets, but while the City might have abstained from allowing anyone else to use them for that purpose, I find nothing here or in the City Charter that expressly authorizes the City to agree with the Plaintiffs that they are to have the exclusive right to the use of the whole width of the streets, and that enables it to put it out of its power to allow other persons or companies to use other portions of these streets for street railway purposes. The words

> "upon such condition,"

to which Mr. Howell referred, certainly cannot be taken either to enlarge the Legislative grant to the Plaintiffs or to confer authority upon the City to enter into any agreement with the Plaintiffs that would be beyond its corporate powers.

Main Street and Portage Avenue are portions of the old roads known as the "Great Highways" that were laid out by the Council of Assiniboia before the transfer of the country to Canada, and these streets, as they now exist, follow, with some slight deviations, the line of these great highways. On the surrender of the country up to Canada by the Hudson's Bay Company, the soil in these highways became vested in the Dominion Government, and by Cap. 49 R. S. C. it was provided that the Governor-General-in-Council might by Order-in-Council transfer to the Province the public thoroughfares or roads that existed as such at the date of the transfer. It appears that by Order-in-Council dated the 3rd of

the City could not
he Legislature to do
rity the Defendants
ct of Incorporation,
in the City by its
nat, at all events, as
n deprived the City
re such that, it must
xpressly given.
wer to enter into an
l operate street rail-
ns in section 154 of
he Plaintiffs' Act of

esaid . . .
hem for that purpose,
greed upon between

Company to use its
ring anyone else to
y Charter that ex-
ey are to have the
nd that enables it to
use other portions

her to enlarge the
the City to enter
yond its corporate

roads known as the
iniboia before the
now exist, follow,
On the surrender
, the soil in these
y Cap. 49 R. S. C.
y Order-in-Council
existed as such at
il dated the 3rd of

February, 1888, Main Street was so transferred, but it is not shown that Portage Avenue has ever been transferred. Main Street for about half a mile or so, runs through Lot 1, in the Parish of St. John, usually known as the Hudson's Bay Company's Reserve, and nearly all of the portion of Portage Avenue occupied by the Plaintiffs is in this lot; and in the grant from the Crown to the Hudson's Bay Company, neither street is excepted or reserved. This Patent was issued before the date of the City Charter of 1882.

By section 155 of the City Charter of 1882, it is provided that

> "every public road, street, etc., shall be vested in the City, subject to any rights in the soil, which the individuals who laid out such road, street, etc., reserved."

Then in the following section it is provided that all persons having made any reservation in any street shall apply within six months for a settlement or adjustment of such claim, otherwise such claim shall cease to exist. The effect of these provisions is, it is argued, that the actual ownership of the streets was vested in the City, and therefore, that the City could dispose of them or grant any rights and privileges in them it saw fit.

It is clear enough, I think, that in saying the streets, etc., should be vested in the City, the Legislature intended that some property in the actual soil should vest in the City. But it is equally clear, I think, that whatever that property was, the City acquired and held it only as for a street and for the use and purposes of the public, and that it could not dispose of or deal with it in any manner not authorized by its charter. Like most of the provisions of our various Acts dealing with Municipalities this section 155 was taken from the Ontario Municipal Act, and its effect was discussed in the case of Sarnia v. Great Western Railway Company, 21 U. C. Q. B., 59, which decided that the Plaintiffs, an incorporated town, could not maintain an action of ejectment against the Defendants for portions of the streets of the Town. If the streets were vested in the Town, as was contended, it may be open to doubt, perhaps, if the actual decision in the case was correct (Vespra v. Cook, 26 U. C. C. P., 1892), but I refer to the case because I think the following remarks made by McLean, J., very well describe the nature of the property that is vested in a Municipality by the section in question.

> "That section," he says, "I think does vest in the Municipalities the several streets and roads within their borders, but it does not necessarily follow that it conveys such a freehold and estate as will enable a Municipality to maintain ejectment—every individual in the community has an equal right to a public street or a road, and the Municpalities cannot be considered as proprietors, and so entitled to control the possession any more than any other person or corporation or person interested in the streets or highways. The property vested in the Municipality is a qualified property, to be held and exercised for the benefit of the whole body of the corporation. * * * They, so far, may be said to hold the freehold, but it is only as trustee for the public, and not by virtue of any title which confers a right of exclusive possession."

shown that Portage
alf a mile or so, runs
as the Hudson's Bay
ge Avenue occupied
Crown to the Hud-
. This Patent was

d that

ghts in the soil, which

having made any
for a settlement or
exist. The effect
of the streets was
of them or grant

c., should be vested
e actual soil should
ever that property
r the use and pur-
eal with it in any
sions of our various
from the Ontario
ia v. Great Western
e Plaintiffs, an in-
gainst the Defend-
were vested in the
the actual decision
t I refer to the case
very well describe
by the section in

several streets and
uch a freehold and
in the community
t be considered as
rson or corporation
e Municipality is a
of the corporation.
stee for the public,

Notwithstanding, then, that the property in the streets, as streets, was vested in the City, I think the power of the City to dispose of or deal with the streets was strictly limited by its corporate powers.

And I cannot say that I find anything that really conflicts with this view in the case of Coverdale v. Charlton, 4 Q. B. D., 104, which was strongly pressed on me by Mr. Howell. In that case the court were considering a provision of the Public Health Act

> "that all streets shall vest, in and be under the control of, the urban authority,"

and what the case decided was, as James L. J., said in Rolls v. St. George, 4 Ch. D. 785,

> "that something more than an easement passed to the local board, and that they had some rights of property in, and on and in respect of the soil which would entitle them as owners to bring a possessory action."

The decision too, was given on a special case stated by two private individuals, and the question whether the grant of the pasturage on the road by the Local Board to the Plaintiff was within the powers of the Board, was in no way raised by the case, or touched upon by the Court. In Wandsworth Board of Works v. United Telephone Company, 13 Q. B. D., 904, the Master of the Rolls speaking of this case and of the section in question said

> "My own view at the time was * * * it passed the property so as to enable the Local Board as far as anybody else than the public was concerned to do with it what any other owner than the public might do. There might be a breach of their duty to the public but with regard to anybody else than the public they could do with it as any other owner could do, that is without infringing that which was their primary duty, namely to keep it as a street."

The "street" in question was, it appears, a green lane in a rural district, and the exclusive grant that had been made was that of the pasturage along the sides of the lane for a period of seven months; and even if it had been held that the Local Board had authority to make such a grant I could hardly consider the case decisive of the one before me.

On this contention of the Plaintiffs I must hold then, that the property the City had in the streets would not, in itself, authorize it to give the Plaintiffs the exclusive right they claim, unless it otherwise appears that it was the intention of the Legislature that this was a disposition of the streets that the City should be authorized to make. I have already held that there is no such authority expressly given, and it remains now for me to consider if the intention of the Legislature that the City was to have this authority can be inferred or implied.

The weight of authority seems to show that at Common Law a corporation could bind itself to do anything to which a natural person could bind himself, and deal with its property as a natural person might deal with his own; and in dealing with corporations created by, or under, acts of parliament for definite purposes

as streets, was
or deal with the

with this view in
ongly pressed on
provision of the

hority."
St. George, 4 Ch.

at they had some
s owners to bring

vate individuals,
ad by the Local
in no way raised
oard of Works v.
e Rolls speaking

so as to enable the
what any other
e public but with
r could do, that is
ect."

rural district, and
ge along the sides
een held that the
rdly consider the

the property the
the Plaintiffs the
was the intention
the City should
o such authority
intention of the
erred or implied.
aw a corporation
bind himself, and
wn: and in deal-
definite purposes

BAIN, J.

and with powers for effecting that purpose, there are evidently two ways in which the powers of such Corporations may be measured. One is, that it may be presumed that the transactions of such Corporations are valid, and that they will be held to be invalid only if it can be shown that the Legislature has deprived them, either expressly, or by necessary implication, of the power to enter into such transactions. The other is that their transactions will be held to be valid only if it appears they were authorized either expressly or by necessary implication. Mr. Howell urged that the former view is the one that prevails in the English Courts, but, as has been pointed out by a learned author (Pollock on Contracts, p. 117), the decision of the House of Lords in Ashbury Ry. Carriage Co. v. Riche, L. R. 7 H. L. 653, has made the conflict between the two series much less sensible in practice than might be expected; and it seems to me, indeed, that this decision goes very far to establish that for all practical purposes the theory of limited capacity is the one that is to prevail.

In Attorney-General vs. Great Eastern Railway Company, 5 App. Cas. 473, Lord Blackburn, speaking of Ashbury vs. Riche, said:

> "That case appears to me to decide, at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving its power for that particular purpose, what it does not expressly, or impliedly authorize, is to be taken to be prohibited.

In the later case of Baroness Wenlock vs. The River Dee Company, 10 Appeal Cases 354, this principle was again confirmed, and applied to the great loss of the Plaintiff, and it was held to apply to all Corporations created by Statute for particular purposes. As Lord Watson said, p. 362,

> "Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act and solely with a view to carrying these provisions into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived from its provisions."

The principles then upon which I must decide the question before me are thus clearly and authoritatively prescribed, but the difficulty in the case lies in the application of the principles to the facts, and it so happens that there are no cases, at least that I have been referred to, in which the English Courts have had to decide a question of this kind upon a state of facts, which is at all similar to that presented here.

It is a long-established principle of English law, that

> "when the law doth give anything to one, it giveth impliedly whatever is necessary for the taking and enjoying the same,"

Co. Liett 56., and in the case of the Attorney-General v. Great Eastern Railway Company that I have referred to, I find Lord Selborne thus defining in what spirit the principle laid down in the Ashbury case should be applied:

y two ways in which
that it may be pre-
nd that they will be
e has deprived them,
to enter into such
d to be valid only if
cessary implication.
ails in the English
llock on Contracts,
arriage Co. v. Riche,
es much less sensible
d, that this decision
e theory of limited

ny, 5 App. Cas. 473,

re is an Act of Parlia-
er for that particular
be prohibited.

Company, 10 Appeal
the great loss of the
ted by Statute for

nce to the purposes of
I am of opinion not
ascertained from the
furtherance of these

on before me are thus
the case lies in the
that there are no
sh Courts have had
is at all similar to

er is necessary for the

at Eastern Railway
us defining in what
applied:

BAIN, J.

> "I agree with Lord Justice James," he says, "that this doctrine ought to be reasonably and not unreasonably understood and applied, and that whatever may be fairly regarded as incidental to or consequential upon those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires."

In the later case of Small v. Smith, 10 App. Cas. 129, Lord Selborne again said:

> "I entirely adhere to what was said in this house in the case of Attorney-General v. Great Eastern Railway Company, that when you have got a main purpose expressed and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done, and against which no expressed prohibition is found, may and ought, prima facie to follow from the authority for effectuating the main purpose by proper and general means."

But he also points out that

> "the grounds of such an implication must be found in the nature of the situation, and the reasonable consequences of that situation, and not in what a man who may do what he pleases with his own may, or may not consider proper to do under such circumstances."

Applying these principles then, what I must consider is, was there anything in the nature of the situation and in the circumstances of the case from which it is a legitimate and reasonable inference that when the Legislature authorized the City to arrange for the construction of street railways and to make an agreement with the Plaintiffs to that end, it also intended that the City might agree with the Plaintiffs that they alone and that none but themselves should be able to obtain the privilege of using the streets for street railway purposes for the period limited.

The Plaintiffs believing, doubtless, that the right or franchise which they received from the City was an exclusive one for at least 20 years, have invested a large sum of money in the construction of their several lines of railway, and in providing and maintaining the necessary rolling stock therefor, and as far as the evidence shows they have carried out the terms of the Agreement and have done nothing to forfeit the rights and privileges the City conferred upon them. The operation of the Defendant Company's Railway, it also appears, will have the effect of materially diminishing the value of the Plaintiff's property; and as the circumstances of the case are presented in the evidence I see no reason why the Court should hesitate to extend its assistance to the Plaintiffs if by legitimate inference it can come to the conclusion that it was the intention of the Legislature that the franchise which the City was authorized to grant might also be an exclusive one. But I am bound to say that, in my opinion, the Plaintiffs have not shown anything in the situation or circumstances that existed when the agreement was made, that would make it what has been termed a

> "potential necessity"

that the franchise should be exclusive or from which I can, in any way legiti-

ht to be reasonably and
regarded as incidental
, ought not (unless ex-

Lord Selborne again

orney-General v. Great
ed and ample authority
which may reasonably
may and ought, prima
per and general means."

the situation, and the
lo what he pleases with

s, was there anything
he case from which it
lature authorized the
o make an agreement
might agree with the
uld be able to obtain
poses for the period

ranchise which they
years, have invested
ines of railway, and
herefor, and as far as
Agreement and have
onferred upon them-
so appears, will have
tiff's property; and
ence I see no reason
o the Plaintiffs if by
s the intention of the
ized to grant might
in my opinion, the
nstances that existed
as been termed a

n, in any way legiti-

BAIN, J. mately infer that it was intended by the Legislature that it should be exclusive. At the time it was entered into, Winnipeg was a new and growing town with a population of about 25,000, and it is well known that at that time it was expected the population would increase much more rapidly than it has. Main street and Portage avenue are streets of unusual width, having a uniform width of 132 feet, and the other streets that have been referred to have a width of 66 feet. At this time none of the streets had been paved, and it is shown that in the Spring and Fall and in wet weather the streets often became almost impassable for ordinary vehicles. These are about the only facts shown that bear upon the question; and while it may be inferred from them that the City would be desirous of having street railways introduced they fail to suggest to me any such conclusion as that it was necessary, in order that the City might come to an agreement with the Plaintiffs to build and operate street railways, it should be able to give the Plaintiffs the exclusive right and put it out of its power for so long a period of twenty years to agree to give a similar right to others should it afterwards prove to be to the public benefit to do so. The width of the streets, especially of the two I am immediately dealing with, is such that it is clearly not physically impossible, or even highly inconvenient, or necessarily dangerous for two rival companies to maintain and operate street railways upon them; so it cannot be said that the franchise which the Plaintiffs obtained was one that has sometimes been called a natural monopoly, that is, one in which competition would be physically impossible, or necessarily destructive. And there is nothing to show either, that at the time the agreement was made the City, on account of its inability to induce the Plaintiffs, or others, to undertake the construction of street railways, had either to agree to give the Plaintiffs a monopoly or to do without railways; and I cannot find that from considerations of this sort or any other, it was necessary that the City should have the power to give the exclusive right in order that it might be able to carry into effect the powers granted to it.

Then, again, the right the Plaintiffs claim they acquired from the City is in the nature of a monopoly. It is true that the right of laying down tracks and of operating railways in the public streets is not a right common to all, and the right to do this must come directly, or indirectly, from the Legislature. But others as well as the Plaintiffs might wish to acquire this right, and against all such, if they have what they claim, have a practical monopoly. Had the Legislature intended that the Plaintiffs were to be authorized to obtain such a monopoly in the streets of Winnipeg it would have been very easy when they were specially

it should be exclusive.
growing town with a
at time it was expect-
it has. Main street
a uniform width of
have a width of 66
l it is shown that in
ecame almost impas-
shown that bear upon
the City would be
ggest to me any such
y might come to an
ailways, it should be
of its power for so
ght to others should it
width of the streets,
ch that it is clearly
ecessarily dangerous
vays upon them; so
tained was one that
which competition
And there is nothing
City, on account of
the construction of
monopoly or to do
s of this sort or any
er to give the ex-
t the powers granted

from the City is in
ng down tracks and
mon to all, and the
Legislature. But
, and against all such,
Had the Legislature
such a monopoly in
they were specially

BAIN, J. dealing with the matter to have said so; but as they have not said so, the intention that they might obtain such a monopoly is not to be imputed without good reason for so doing.

The section of the City Charter that authorizes the City or the Council to pass by-laws for the construction of street railways also authorizes by-laws for regulating and governing them when they are constructed; and it was urged that this power to regulate implied a power to restrict and limit, and that a by-law limiting the right to use the streets to the Plaintiffs alone is not unreasonable, and therefore is not *ultra vires*. It is quite true that a power to regulate, must in certain cases involve a power not only to limit, but also to prohibit, because if it did not the power would, in many cases be found to be nugatory If the public benefit sought to be obtained in giving a Municipality power to regulate can only be obtained by prohibition, then a By-law going that length may be held to be unreasonable and *ultra vires*. Slattery v. Naylor, 13 App. Cas., 446. But the circumstances here, as we have seen, do not show any necessity for limiting the right to use the streets exclusively to the Plaintiffs. The power to govern and regulate the operation of street railways after they have been constructed is one that is absolutely necessary that the City should have. The word "regulate" in the sub-section has a well-defined meaning, and I think the Legislature never intended in using that word that it was to be implied from it that the City might give to one person or company the monopoly of using the streets for a long or indefinite term.

In England until at least the passing of the Municipal Acts in later years, the powers of incorporated towns and cities rested on an entirely different basis from those of municipal corporations in this Province. Here, and in the Province of Ontario, from which our municipal system is closely copied, municipalities have been established directly by the Legislature for the sole purpose of more conveniently carrying out the details of certain portions of civil government specially delegated to them, and municipal corporations exist only for the purposes for which they were created. This is also the theory and system of municipal government that exists in, I think all the states of the United States, and as has been pointed out by Mr. Bryce in his work on Ultra Vires, there is no country in which there are so many corporations or in which the law, as to the powers of corporations, municipalities and municipal and others has been so much discussed as in the United States. Both in this Court and in the Courts of Ontario when questions of municipal law are under discussion decisions of the Courts in the United States, both Federal and State, have always been recognized

not said so, the inten-
nputed without good

ty or the Council to
uthorizes by-laws for
; and it was urged
limit, and that a by-
alone is not unreason-
a power to regulate,
but also to prohibit,
und to be nugatory
unicipality power to
w going that length
ry v. Naylor, 13 App.
not show any neces-
the Plaintiffs. The
ways after they have
he City should have.
meaning, and I think
as to be implied from
nonopoly of using the

l Acts in later years,
ntirely different basis
Here, and in the Pro-
y copied, municipali-
the sole purpose of
tions of civil govern-
ns exist only for the
heory and system of
of the United States,
Ultra Vires, there is no
ich the law, as to the
l others has been so
urt and in the Courts
ission decisions of the
lways been recognized

BAIN, J. as instructive, and I think I may say that when they do not conflict with principles established by decisions of the English Courts they have very generally been adopted and followed.

Considering the facts of the case in the light of authoritative principles of English law I have come to the conclusion that I cannot by what I would consider a legitimate inference infer from these facts that it was the implied intention of the Legislature that the City was to have power to give the Plaintiffs the exclusive use of the streets, and it is not necessary, therefore, that I should consider at any length the numerous decisions of the United States Courts, both State and Federal that bear upon the question; and it is the less necessary because Mr. Howell fully conceded in the argument that the whole weight of these cases is against the Plaintiffs' contention.

The principle of construction that these Courts apply in construing Legislative grants to corporations is thus laid down by the Supreme Court in Minturn v. Larue, 23 How. 435,

> "It is a well settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public."

And dealing particularly with Municipal Corporations Judge Dillon, in his well-known work on Municipal Corporations at section 39 uses the following language that has more than once been expressly adopted by the Courts:

> "Municipal Corporations," he says, "can exercise the following powers and no other: First, those granted in express terms. Second, those necessarily and fairly implied in, or incidental to the powers expressly granted. Third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the Courts against the corporation, and the power is denied."

And in such cases as Minturn v. Larue, above referred to, Fanning vs. Gregorie, 57 U. S., 523, the State v. Cincinatti, 18 Ohio State R., 264. Parkersburg Gas Company v. Parkersburg, S. E. R. 650, Saginaw Gas Light Company v. Saginaw, Fed. Reporter Vol. 28, No. 10, 529 and many others that might be cited the above principles have been applied with the result that claims for exclusive right in public franchises resting on the implied powers of municipal corporations to grant such franchises have been denied. As was said in one of these cases nothing will be intended from a legislative grant to a municipal corporation.

If I were able to regard the City as having been in the position of a man who could do with his own as he pleased, I cannot say that I could see anything unreasonable in its undertaking to give the Plaintiffs the monopoly of the streets for twenty years, in consideration of the Plaintiffs undertaking to introduce and operate street railways. But that is a view of the City's position that I am

conflict with princi-
very generally been

itative principles of
what I would con-
s the implied inten-
to give the Plaintiffs
refore, that I should
nited States Courts,
is the less necessary
the whole weight of

n construing Legisla-
Court in Minturn v.

lature to corporations,
sed under them as are
necessary implication,
g out of the terms used

ge Dillon, in his well-
he following language
rts:

powers and no other:
mplied in, or incidental
ects and purposes of the
le doubt concerning the
e power is denied."

Fanning vs. Gregorie,
4. Parkersburg Gas
Company v. Saginaw,
might be cited the
ms for exclusive right
nicipal corporations to
one of these cases
cipal corporation.
he position of a man
I could see anything
opoly of the streets for
ing to introduce and
's position that I am

BAIN, J clearly precluded from taking. It could act in the matter only as it was authorized to do by the Legislature, and I cannot find that the Legislature either expressly or by imputation authorized it to give the Plaintiffs the monopoly of the whole of the streets or that it was necessary that the City should have given this monopoly in order that it might carry into effect the authority that it did receive. If I am right in this view, then the Plaintiffs cannot have the legal right they claim; and having failed to establish their legal right they cannot be entitled to an injunction.

I have considered the case as it specially refers to Main Street and Portage Avenue; but if the Plaintiffs are not entitled to an injunction, as to these streets they cannot, of course, be entitled to one as to the other streets mentioned in the Bill.

Even if it could be held that the City had authority and power to give the Plaintiffs the monopoly they claim that would still have to face the contention of the Defendants, that the City did not in fact give them this monopoly. The exclusive right mentioned in the By-law and the Agreement, the Defendants say, is limited to the portion of the street actually occupied by the railway, and further to a railway operated by the force or power of animals. However, as I have decided against the Plaintiffs in the other branch of the case, it is not necessary that I should express any opinion as to what is the proper construction of the By-law and Agreement.

It appears that the line or tracks of the Defendant Company's railway cross the Plaintiffs' tracks in several places on Main Street and Portage Avenue; and the Plaintiffs' Bill contains a prayer that the Defendant Company may be restrained from crossing the Plaintiffs' tracks, except for the purpose of crossing the same to run upon the streets which are not occupied by the Plaintiffs, and which the Plaintiffs do not wish to occupy. But if the Defendant Company has the right to lay down and operate its railway on these streets, section 33 of their Act of Incorporation gives them power to cross the lines of the Plaintiffs' railway subject to the provisions of the Manitoba Railway Act; and it is shown that under the provisions of the last mentioned Act, the Railway Committee of the Privy Council has approved of the several crossings, and that the Defendant Company have complied with the directions of the Committee in regard the...

The Plaintiffs' Bill is dismissed with costs.

---

ly as it was autho-
Legislature either
ffs the monopoly of
should have given
thority that it did
have the legal right
y cannot be entitled

Street and Portage
, as to these streets
s mentioned in the

power to give the
ce the contention of
is monopoly. The
e Defendants say, is
ailway, and further
However, as I have
, it is not necessary
construction of the

pany's railway cross
rtage Avenue; and
Company may be
purpose of crossing
y the Plaintiffs, and
ndant Company has
, section 33 of their
e Plaintiffs' railway
nd it is shown that
y Committee of the
that the Defendant
e in regard the ...

REASONS FOR JUDGMENTS of TAYLOR, C. J., and DUBUC, J., and KILLAM, J., on appeal to Full Court of Queen's Bench, Manitoba, from Decision of BAIN, J.

JUDGMENT BY TAYLOR, C. J.

TAYLOR, C. J. The Act 45 Vic. c. 36 Manitoba, incorporating the City of Winnipeg, passed in 1882, provided by sec. 154, that the City Council might pass by-laws among other things,

> 7. "For authorizing the construction of any street railway or tramway upon any of the streets or highways within the City, and for regulating and governing the same, and for fixing the rates to be charged thereon."

The Plaintiff Company was incorporated in 1882 by the Act 45 Vic., cap. 37 Manitoba. In the same year, under an agreement with the City of Winnipeg dated 7th July, 1882, entered into under the authority and in pursuance of a by-law of the City council, No. 178, and passed on the 12th June, 1882, the Plaintiff Company constructed a tramway or street railway upon Main street in the City of Winnipeg, from the Assiniboine river on the south to the Canadian Pacific Railway Station on the north. A few years after a branch line was constructed from the junction of Main street and Portage avenue, running along Portage avenue as far as Kennedy street, and thence along that street as far as Broadway. Still later, the line on Main street was continued on that street, north from the Canadian Pacific Railway Station, and as far as the Parish of Kildonan. The original line and these extensions have ever since their construction been, and now are operated by the Plaintiff Company, according to terms and provisions of the By-law and Agreement. The Act of Incorporation, By-law and Agreement all provide that the motive power used shall be

> "the force and power of animals, or such other motive power as may be authorized by the said council of the said City."

In 1892, the City council passed another by-law, No. 543, which after reciting that certain persons therein named had applied for the right and privilege to construct and operate a double or single track railway over and along the streets and highways of the City, proceeded to grant the applicants the privilege applied for, the motive power used to be,

> "electric power or such other power as may be found practicable."

Following upon this, certain persons, including those named in By-law 543, were by 55 Vic. c. 56, Manitoba, incorporated as "The Winnipeg Electric

C. J., and DUBUC, J.,
of Queen's Bench,

J.

ty of Winnipeg, passed
ght pass by-laws among

way upon any of the streets
nd for fixing the rates to be

he Act 45 Vic., cap. 37
the City of Winnipeg
nd in pursuance of a by-
June, 1882, the Plaintiff
Main street in the City
o the Canadian Pacific
ch line was constructed
running along Portage
that street as far as
ntinued on that street,
as far as the Parish
have ever since their
iff Company, according
The Act of Incorpor-
re power used shall be

y be authorized by the said

No. 543, which after
plied for the right and
rack railway over and
o grant the applicants

ticable."

hose named in By-law
The Winnipeg Electric

TAYLOR C. J. Railway Company," and the By-law was thereby validated and confirmed in all respects as if it had been enacted by the Legislature. In pursuance of this By-law the Defendant Company have constructed and are now operating by electricity a street railway with tracks on Main street and Portage avenue laid alongside those of the Plaintiff Company, and also upon other streets of the City.

The Plaintiff Company claim that they are, under By-law No. 178, and their Agreement with the City, entitled to the exclusive use of the whole of the streets upon which they are operating their line for street railway purposes, and have begun this suit to obtain an injunction restraining the Defendant Company from operating their line of railway, and for a declaration that they have a legal right to the exclusive use which they claim.

The Act 55 Vic. C. 56, incorporating the Defendant Company, was opposed by the Plaintiff Company before the Private Bills Committee of this Legislature, so it was passed by the Legislature with full knowledge that the Plaintiff Company claimed the exclusive right now asserted in this suit. But the 33rd section of the Act provides, that

> "Nothing contained in this Act, or in the schedule thereto, shall in any way affect or take away any right held by, vested in, or belonging to the Winnipeg Street Railway Company, if any such there be, but any such right may be held and exercised by the Winnipeg Street Railway Company as fully and effectually as if this Act had not been passed."

The By-law, No. 543, is also expressed to be made

> "subject to the legal rights"

of the Plaintiff Company. It is therefore necessary to enquire what these are and whether the Plaintiff Company have the exclusive rights and privileges claimed. They concede that, if they have no exclusive right, or if, though the By-law and Agreement purport to give an exclusive right, it was not in the power of the City Council to grant it, they cannot maintain their suit.

The Plaintiff Company insist that for the period of time mentioned in the By-law and agreement they have acquired the legal right to the exclusive use of such streets in the city as they may occupy with their line of railway, that is, that they are entitled to the exclusive use of the whole width as well as length of the streets so occupied by them.

The Act incorporating the Plaintiff Company provides in Section 9 that the Company, on obtaining the consent of the city, shall

> "have full power and authority to use and occupy any and such parts of the streets or highways aforesaid as may be required for the purposes of their railway track."

The wording of the By-law, clause 1, and of clause 1 of the agreement is,

> "such railway shall have the exclusive right to such portion of any street or streets as shall be occupied by said railway."

lidated and confirmed in
ature. In pursuance of
and are now operating
reet and Portage avenue
upon other streets of the

er By-law No. 178, and
use of the whole of the
et railway purposes, and
the Defendant Company
on that they have a legal

Company, was opposed
nittee of this Legislature,
ledge that the Plaintiff
his suit. But the 33rd

any way affect or take away
Company, if any such there
Railway Company as fully

enquire what these are
e rights and privileges
right, or if, though the
ight, it was not in the
ain their suit.
time mentioned in the
t to the exclusive use of
line of railway, that is,
width as well as length

les in Section 9 that the

rts of the streets or highways

1 of the agreement is,
y street or streets as shall be

TAYLOR, C. J. On these words great reliance is placed. But there are other arguments used in favor of exclusiveness, such as that onerous conditions were imposed upon the Plaintiff Company, and they have fulfilled these; that in the very nature of things, and the conditions of a railway track there must be an exclusiveness; and that unless an exclusive right had been given no one would have made or taken the risk and expended such a large amount of money as they have done.

The position taken by the Defendant Company is, that the Plaintiff Company have no such exclusive right as is claimed, and that they have an act of the Legislature, and the By-law thereby confirmed giving them certain rights, the Court should not interfere by injunction, but should leave the Plaintiff Company to enforce against the City any rights they may have. As to this, I agree with the learned Judge who heard the case in the first instance, that the Act incorporating the Defendant Company having in effect been passed on the supposition that the Plaintiff Company have not the right now claimed, the jurisdiction of the Court cannot be said to be taken away. Though I also agree with him, that before the Court will interfere so as to defeat the legislative grant to the Defendant Company, the Plaintiff Company must place the legal right they claim beyond doubt.

The Plaintiff Company assert that an exclusive right has been granted to them, and that it was within the corporate power of the City to grant such a right. The Defendant Company on the other hand, attack both of these propositions and say, the City did not grant an exclusive right, and if it undertook to do so the grant is invalid, because it exceeded its corporate powers in making such a grant. The learned Judge at the hearing dealt with the powers of the City, and having come to the conclusion that granting an exclusive right was beyond its authority, it was unnecessary for him to consider whether the City did undertake to confer such a right by the By-law and Agreement with the Plaintiff Company.

Counsel for the Plaintiff Company concede that the American cases dealing with the powers of Municipal Corporations may be considered as opposed to the position which they take, and that Cooley in his work on Constitutional Limitations, at page 231, fairly states the law as expounded by the American Courts.

> "The general disposition of the Courts in this country has been to confine Municipalities within the limits that a strict construction of the grants of powers in their Charters will assign them; thus applying substantially the same rule that is applied in charters of private incorporation. The reasonable presumption is, that the State has granted in clear and unmistakeable terms all it has designed to grant at all."

This doctrine seems to have prevailed from an early period in the United States, though perhaps for the first time so distinctly asserted in Charles River Bridge v. The Warren Bridge, 36 U. S., 420, a case in which, however; two

other arguments used in
were imposed upon the
t in the very nature of
ust be an exclusiveness;
one would have made or
oney as they have done.
ay is, that the Plaintiff
and that they have an
ned giving them certain
should leave the Plaintiff
may have. As to this, I
e first instance, that the
effect been passed on the
right now claimed, the
ay. Though I also agree
efeat the legislative grant
st place the legal right

ght has been granted to
City to grant such a right.
th of these propositions
if it undertook to do so
owers in making such a
the powers of the City,
clusive right was beyond
ether the City did under-
ment with the Plaintiff

e American cases dealing
idered as opposed to the
on Constitutional Limita-
y the American Courts.

confine Municipalities within
ters will assign them; thus
corporation. The reasonable
s all it has designed to grant

y period in the United
sserted in Charles River
in which, however; two

TAYLOR, C. J. judges dissented, one of them being the eminent jurist Judge Storey. Since then the rule of strict construction as applied to such charters, has prevailed, and as a learned judge in the Supreme Court of Pennsylvania once said,

> "In the construction of a Charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the Corporation."

Dillon, in his work on Municipal Corporations, at section 91, says,

> "The rule of strict construction is not as directly applicable to the ordinary clauses in the Charters or Incorporating Acts of Municipalities, as it is to the Charters of Private Corporations; but it is equally applicable to grants of powers to Municipal and Public bodies which are out of the usual range, or which may result in public burdens, or which in their exercise touch the right to liberty or property, or as it may compendiously be expressed, any common law right of the citizen or inhabitant."

In the American and English Encyclopædia of Law, Volume 15, page 1055, after stating in the text that a municipal corporation cannot, in the absence of express legislative authority, grant to any person or corporation the exclusive privilege of using the streets for laying gas or water pipes, street railway tracks, etc., it is said in a note that the weight of judicial authority supports this statement in the text, although there are several decisions which sustain the contrary doctrine. Two such cases are there cited. One, Newport vs. Light Co., 8 Kentucky Law Report 22, which was relied upon by Mr. Howell in this argument, the other Desmoines Street Railway Company vs. Desmoines, 73 Iowa, 513. In that case the Court held that although there was no grant of power in express terms authorizing the Council to confer an exclusive privilege in the use of the streets, yet under the circumstances of the case, and to procure a better public service the Council could grant a valid exclusive right for a limited period, such contract being necessary to secure the service which it might not otherwise be able to obtain. It would appear, however, that the power there given the city was somewhat peculiarly worded, as it seems to have been authorized to "grant or prohibit" the laying down street car tracks within its limits.

It is, however, insisted that under English law the powers of Municipal Corporations are broader than those of other Corporations. For this Brice on Ultra Vires is relied upon at page 516, where he says:

> "A wider and more liberal construction will be put upon the powers vested in bodies, such as Local Government Boards, Municipal Corporations, and Sewerage Commissioners, whose duties are the accomplishment of public improvements."

The learned judge has gone very fully into the consideration of the English authorities, bearing upon the manner in which powers given by the Legislature to Corporations are to be construed. Applying the principles laid down in these to the present case he held that there was not anything in the nature of the situation, and in the circumstances from which it is a legitimate and reasonable in-

dge Storey. Since then
, has prevailed, and as a
e said,

nd every resolution which

ction 91, says,

ne ordinary clauses in the
vate Corporations; but it is
n are out of the usual range,
right to liberty or property,
en or inhabitant."

Volume 15, page 1055,
nnot, in the absence of
poration the exclusive
, street railway tracks,
ity supports this state-
ch sustain the contrary
vs. Light Co., 8 Ken-
well in this argument,
nes, 73 Iowa, 513. In
t of power in express
vilege in the use of the
procure a better public
a limited period, such
ight not otherwise be
r there given the city
authorized to "grant
limits.
powers of Municipal
s. For this Brice on

vested in bodies, such as
ers, whose duties are the

eration of the English
en by the Legislature
les laid down in these
the nature of the situ-
ate and reasonable in-

TAYLOR, C. J. ference, that, when the Legislature authorized the City to arrange for the construction of street railways, and to make an Agreement with the Plaintiff Company, it also intended that the City might agree that the Plaintiff Company alone should be able to obtain the privilege of using the streets for street railway purposes during the time limited. With the conclusion so arrived at by him I quite agree. I also concur with him in the finding that it has not been shown by the Plaintiff Company that there was anything in the existing situation and circumstances, when the agreement was entered into, which would make this franchise, being exclusive, what has been spoken of as a potential necessity.

Whatever argument may be brought forward as to the broader powers of Municipal Corporations, there are numerous cases showing plainly that strict compliance with the provisions of any statute by which the rights of the public to the use of every part of a highway are interfered with, is necessary, and they must be strictly followed. In Ponthren v. Pennefather, 5 Ta at. 634; Rex v. Justices of Worcestershire, 8 B. & C. 254; Rex v. Justices of Kent, 10 B. & C., 477; Rex v. Justices of Cambridgeshire, 4 A. & E. 111; Rex v. Downshire 4 A. & E., 698; Rex v. Milverton, 5 A. & E., 841, may be referred to on this point. In the Province of Ontario the powers of Municipal Corporations as to dealing with public highways have also been strictly construed, and they have been rigidly confined within the powers given by statute Rex v. Great Western Railway 32 U. C. R., 506; Re Lawrence & Thurlow, 33 U. C. R., 223; Cameron v. Waite, 3 App. R. 175; Re. Laplante & Peterboro, 5 O. R. 634. In Winter v. Keown, 22 U. C. R., 341, Hagarty, J., said:

> "The Legislature has given a certain power to the Municipality, and it seems to me that such power must be strictly executed."

On the contention of the Plaintiff Company, the City having power to pass By-laws for the construction of any street railway have done so giving them an exclusive right for twenty years. No doubt the City, having once made an agreement with the Plaintiff Company might decline for twenty years to entertain proposals on the part of any other person or corporation to construct any other street railway, and in that way practically give the Plaintiff an exclusive right, but it would be for the Council of any particular year, in which such a proposal might be made, to consider and deal with it. Here it is claimed that the City has bound itself that no Council shall for twenty years consider any such proposal. In other words, the Council of 1882 agreed, that they and their successors for twenty years to come should abdicate part of their powers as a Council. Ayr Harbour Trustees v. Oswald, 8 App. Cases, 623; Vandecar v. East Oxford, 3 App. R., 131, are authorities that they could not do so. I also agree

to arrange for the con-
ment with the Plaintiff
at the Plaintiff Company
streets for street railway
so arrived at by him I
it has not been shown
in the existing situation
, which would make this
potential necessity.

o the broader powers of
wing plainly that strict
the rights of the public
h, is necessary, and they
r, 5 Te at. 634; Rex v.
of Kent, 10 B. & C., 477;
v. Downshire 4 A. & E.,
o on this point. In the
ions as to dealing with
they have been rigidly
at Western Railway 32
3; Cameron v. Waite, 3
In Winter v. Keown, 22

, and it seems to me that

ty having power to pass
done so giving them an
having once made an
twenty years to enter-
ation to construct any
ne Plaintiff an exclusive
year, in which such a
Here it is claimed that
nty years consider any
ed, that they and their
of their powers as a
623; Vandecar v. East
t do so. I also agree

TAYLOR, C. J. with the conclusion come to by the learned judge, that whatever property in the streets, as streets, was vested in the city, the power to dispose of, or deal with these streets, was strictly limited by its corporate powers.

But did the City grant, or undertake to grant to the Plaintiff Company the exclusive right claimed? I cannot see that the City made any such grant. It is only in the first clause of the By-law, and in the first clause of the Agreement that any direct mention of exclusiveness is made. Throughout the By-law and Agreement there are two distinct things spoken of and dealt with, the "Company" and the "Railway." Now, taking the plain language of the By-law and Agreement, it seems to me, it is not the Company but the railway that is given any exclusive right. The Company is authorized and empowered

> "To construct, maintain, complete and operate . . . a double or single track railway . . . . upon and along any of the streets or highways of the City . . . and such railway shall have the exclusive right to such portion of any street or streets as shall be occupied by said railway."

Now any grant to a Company authorizing the construction of a street railway must confer an exclusive right to a certain extent. Once the track and rails are laid it is evident no other Company can lay a track and rails upon the same space of ground as has been already occupied by the track and rails of the first Company. To permit such a thing would certainly hinder, if not entirely prevent, the operation of the railway by both Companies. The language used there seems to me, carefully used to express just that extent of exclusiveness necessarily involved in the nature of things, in the construction of a street railway.

Then the first part of clause 16 of the By-law, and clause 17 of the Agreement, show that even this right is a limited one, for it is provided that vehicles may travel on, along or across the track, subject only to the obligation to turn out on the approach of any car so as to leave the track free. The Plaintiff Company may have such a right to the portions of the streets actually occupied by their tracks and rails as is in the very nature of things involved in the having a railway track at all, but that is something widely different from what they claim, an exclusive right to the whole length and width of every street on which they have a track laid.

Further, section 9 of the Plaintiff Company's charter shows this limited right to have been all that the Legislature intended should be dealt with. The language used there is

> "The Company shall have full power and authority to use and occupy any, and such parts of any of the streets and highways aforesaid, as may be required for the purposes of their railway track, the laying of the rails and the running of their cars."

That gives no countenance to the claim of the Plaintiff Company. To support

atever property in the
pose of, or deal with

Plaintiff Company the
le any such grant. It
use of the Agreement
ghout the By-law and
lealt with, the "Com-
ge of the By-law and
railway that is given
owered

a double or single track
s of the City * * *
ct or streets as shall be

ction of a street rail-
nce the track and rails
d rails upon the same
and rails of the first
if not entirely pre-
e language used there
xclusiveness necessar-
street railway.
use 17 of the Agree-
provided that vehicles
ne obligation to turn
The Plaintiff Com-
actually occupied by
lved in the having a
from what they claim,
street on which they

ows this limited right
alt with. The lan-

by any, and such parts
poses of their railway

mpany. To support

TAYLOR, C. J. such a claim one would expect to find some provision that they are to have full power and authority to use those streets or highways on which they may lay their tracks. On the contrary it is only such part of any street as may be required for the purposes of the track, distinctly confining their right within that limit.

The exclusive right of ferries was urged as an argument in support of the claim of the Plaintiff Company, but I can see no analogy between this case and that of a ferry. Ancient ferries, and I believe ancient ferries only, are held to have exclusive rights, but they are so for the reason assigned by Blackstone, volume 3, page 219.

> "Where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of all the King's subjects; otherwise he may be grievously amerced."

This passage was quoted with approval in Letton v. Godden, L. R. 2 Eq. 132. The same principle, the obligation to maintain the ferry, was remarked on in Hopkins vs. Great Northern Railway Co., 2 Q. B. D., 224. It is true in Newton v. Cubitt, 12 C. B. N. S. 32 Willes, J., spoke of the exclusive right as given, because, in an unpopulous place there might not be sufficient profit to maintain the boat without a monopoly. The obligation to maintain the ferry seems, however, the true ground, and on that ground Kindersley, V. C., put it in Letton v. Gooden, L. R., 2 Eq., 133,

> "The only ground" he said, "upon which the owner of an ancient ferry can claim protection is the obligation he is under to keep the ferry always in a fit state for the use of the public; and it is upon this principle alone that the several cases which have been cited, in which the owner of the ferry has been protected, have been decided."

Now, I can find nothing in this By-law or Agreement at all analogous to the obligation to keep the ferry in a fit state for use of the public. There is nothing in either of them under which the Plaintiff Company can be compelled to operate their street railway. They are, it is true, to place and continue on their railway tracks good and sufficient cars, they are to run the cars during, and at such times as the Council may direct, and so on, but suppose they do not comply with these requirements, and wholly cease to operate the railway, what then?

There is nothing in the By-law or Agreement under which they can be made to operate the railway. Clause 22 of the By-law, clause 24 in the Agreement, does not seem to provide for a forfeiture of privileges in case of failure to keep the railway in operation. That seems to refer to clause 9 of the By-law, 10 of the Agreement. What is provided for is, that the Company shall complete their track and have cars running within a limited time, and failing that, shall forfeit the privileges and rights. The,

> "do all that is required of it in the manner provided for in this by-law within the time limited therein"

hey are to have full
which they may lay
ıy street as may be
ıg their right within

ıt in support of the
etween this case and
ies only, are held to
d by Blackstone, vol-

it always in repair and
ously amerced."

dden, L. R. 2 Eq. 132.
was remarked on in
It is true in Newton
e right as given, be-
profit to maintain the
y seems, however, the
in Letton v. Gooden,

ferry can claim protec-
r the use of the public;
n cited, in which the

at all analogous to
he public. There is
ny can be compelled
lace and continue on
run the cars during,
t suppose they do not
e the railway, what

which they can be
use 24 in the Agree-
in case of failure to
e 9 of the By-law, 10
pany shall complete
nd failing that, shall

y-law within the time

TAYLOR, C. J. must refer to the matters dealt with by such clauses as 2, 4 and 5 of the By-law.

Upon the argument, counsel for the Plaintiff Company dealt largely with the exclusive right claimed, and the powers of the City and the construction of the By-law and Agreement as bearing upon that question. Little was said as to any rights the Plaintiff Company may have under clause 25 of the By-law, 27 of the Agreement, but these are referred to in the Bill of Complaint.

They are considered by my Brother Killam in his judgment, and as I agree with what he says I do not dwell upon them.

Upon both grounds then, that the City had no power to confer an exclusive right, and that it has not given, nor undertaken to give, any such right, the contention of the Plaintiff Company, in my opinion, fails, and the Decree made at the Hearing should be affirmed with costs.

DUBUC, J., concurred in the Judgment of the Chief Justice.

2, 4 and 5 of the By-law.
mpany dealt largely with
y and the construction of
tion. Little was said as
clause 25 of the By-law,
Bill of Complaint.
judgment, and as I agree

ver to confer an exclusive
give, any such right, the
fails, and the Decree made

Justice.

Judge's Reasons.

MR. JUSTICE KILLAM,

12th December, 1892.

KILLAM, J.

The Plaintiff Company was incorporated by Act of the Provincial Legislature, 45 Vic. cap. 37, for the purpose of constructing and operating street railways in the City of Winnipeg and adjacent territory. A by-law was then passed by the Council of the City, authorizing the Company to construct and operate such railways on the streets of Winnipeg, and an agreement was entered into between the Civic Corporation and the Company embodying the terms of the by-law. The Plaintiff has constructed, and has for several years operated such lines of railway on some of the streets of the City. This Company claims that, under and by virtue of this Statute, By-Law and Agreement it has the exclusive right for a certain period to construct and operate street railways in Winnipeg. It alleges that this right has been infringed by the passage by the Council of the Defendant Corporation, the City of Winnipeg, of a by-law authorizing the Defendant Company to construct and operate similar railways and by the construction of such new lines, partly on the streets on which the Plaintiffs' railways are, and partly on other streets, and this suit is brought to enforce the right claim. The suit came up for hearing before my Brother Bain, who dismissed the Bill on the sole ground that the City Corporation had no power to grant such an exclusive right. The Plaintiffs now seek to have this Judgment reversed, and to obtained a decree in accordance with the prayer of its Bill of Complaint.

The principal prayer of the Bill, and the one to which the arguments before us were almost exclusively directed, as to declaration of such a right as to the streets on which the Plaintiffs' lines have been built, and an injunction to restrain the Defendant Company from constructing or operating such railways on these streets, two main points were raised and argued on this rehearing: first, as to the power of the City Corporation to bind itself by such an agreement; and, secondly, as to the proper construction of the agreement.

In considering the former of these questions it appears to me unimportant to determine the limits of corporate powers generally. For the Plaintiff it is contended that the property in the soil of the streets is vested in the City Corporation, which may, therefore, bind itself as to the use of that property. But the cases of Coverdale v. Charlton, 4 Q. B. D., 104, Rolls v. St. George's, 14 Ch. D. 785, and the Board of Works v. The Union Telephone Co., 13 Q. B. D., 904, seem to show that this must be regarded as a qualified property. The Corporation held the lands for use as streets and highways. Its Council had certain powers as to altering or closing these streets, and if it should exercise such

Provincial Legislature,
g street railways in the
as then passed by the
ruct and operate such
s entered into between
terms of the by-law.
operated such lines of
ny claims that, under
has the exclusive right
ways in Winnipeg. It
by the Council of the
w authorizing the De-
s and by the construc-
he Plaintiffs' railways
ht to enforce the right
ain, who dismissed the
power to grant such an
gment reversed, and to
of Complaint.
the arguments before
such a right as to the
n injunction to restrain
uch railways on these
is rehearing: first, as
ch an agreement; and,

rs to me unimportant
For the Plaintiff it is
sted in the City Cor-
f that property. But
v. St. George's, 14 Ch.
Co., 13 Q. B. D., 904,
operty. The Corpora-
Council had certain
should exercise such

KILLAM, J. powers some question might arise as to the ownership of any portion thus ceasing to be public highways. With this, however, we have nothing now to do.

I take it that, without statutory authority, the Corporation could not authorize the construction and operation of a street railway along and upon a public street. Such a structure would be regarded in law as a nuisance—at least, if so found by a jury. This appears to have been settled in Reg. v. Train, 3 F. & F. 22, 2 B. & S. 640; 9 Cox C. C., 180. Certainly, without statutory authority, the Corporation or its Council could give no right of occupation of a portion of the streets as against the public, or compel the public to give way to the vehicles of the railway proprietors. I doubt if it could even grant such a right of occupation for railway purposes enforceable as against the Corporation itself. It does not seem possible then to treat the case as one in which the corporation was disposing of some interest in a portion of its lands, and assuming to bind itself not to allow a certain user of the remainder, or some part of the remainder.

By the Plaintiffs' Act of Incorporation, 45 Vic. cap. 37, sec. 8, the Plaintiff Company was anthorized

> "to construct, maintain, complete and operate and from time to time remove and change a double or single track iron railway, with the necessary side tracks, switches and turn-outs for the passage of cars," &c.

upon and along the streets or highways in Winnipeg. And by sec. 9, the Company was given

> "full power and authority to use and occupy any, and such parts of any, of the streets or highways aforesaid, as may be required for the purposes of their railway track, the laying of the rails and the running of their cars and carriages,"

with a proviso requiring the consent of the City Corporation, and authorizing it

> "to grant permission to the said Company to construct their railway as aforesaid, * * across and along, and to use and occupy, the said streets or highways, or any part of them, for that purpose, upon such condition, and for such period or periods, as may be respectively agreed upon between the Company and the said City," etc.

At that time the only statutory authority in force, expressly referring to street railways in Winnipeg, was contained in the Act 38 Vic., cap. 50, sec. 107, s.s. 5, by which the City Council was authorized to pass By-laws

> "for regulating and governing street railway companies and fixing the rates to be charged thereon."

But three days after the passing of the Plaintiffs' Act the Consolidated Charter of the City, 45 Vic., cap. 36, received the assent of the Lieutenant-Governor; and as if the Legislature in the consideration of the question had found it desirable to make the powers of the Council upon the subject more clear, the Council was by the later Act, sec. 104, s.s. 7, empowered to pass By-laws

y portion thus ceasing
ng now to do.
orporation could not
ay along and upon a
s a nuisance—at least,
n Reg. v. Train, 3 F.
t statutory authority,
ation of a portion of
e way to the vehicles
uch a right of occu-
orporation itself. It
the corporation was
suming to bind itself
the remainder.
sec. 8, the Plaintiff

e remove and change
s and turn-outs for the

by sec. 9, the Com-

any, of the streets or
ack, the laying of the

, and authorizing it

as aforesaid, * *
part of them, for that
tively agreed upon be-

pressly referring to
ic., cap. 50, sec. 107,
aws

e rates to be charged

onsolidated Charter
nant-Governor; and
d found it desirable
ar, the Council was

KILLAM, J. "for authorizing the construction of any street railway or tramway upon any of the streets or highways within the City, and for regulating and governing the same," etc.

I am unable to accede to the argument of the Plaintiffs' Counsel that this gave power to authorize the construction of only one such railway, or one such alone on any particular street. It appears to me that the power thus given was as general as it was possible to make it, and that it enabled the Council to authorize as many sets of railway tracks on any particular street, under the management or control of as many different persons or bodies, as the Council might deem proper, and the circumstances might admit.

The real question then is, whether the Council by by-law, or the Corporation by agreement, could deprive the Council of the right to exercise any such power. I am of opinion that neither of them could do so without statutory authority.

The right to use the streets as highways is the right of the public generally not that of the inhabitants of Winnipeg alone. In exercising its powers respecting the streets, the City Council is not merely the agent or the governing body of the City Corporation, or of the ratepayers, it is also a public body, having these powers vested in it on public grounds.

Although a railway track may constitute such an obstruction to the free use in some ways of the streets, that, if constructed without authority, it would be a nuisance, yet experience has shown that the facilities afforded by such a structure are so great, and that the extent of the obstruction occasioned by it may be so minimized, that it is really a valuable aid to the traffic of the streets. In the United States the doctrine seems firmly settled, that the laying down of rails on the street and the running thereon of cars for the conveyance of passengers is only a later mode of using the street as a way—that it is a change in the mode only, and not in the use. See Briggs v. the Lewiston & Auburn Horse R. R. Co., 79 Me., 363; Williams v. The City Electric Street Railway Co., 41 Fed. Rep. 556: Halsey v. The Rapid Transit Street Railway Company, 20 Atl. Rep. 859; Lockhart v. The Craig Street Railway Company, 139 Penn. St. 419.

The evidence in this case shows that the railway track under some circumstances might even facilitate the ordinary modes of traffic of a street.

The Council, then, in the power to pass By-laws upon this subject, was given an important discretionary power, to be exercised in the public interest. Certainly it was not obliged to authorize the construction of any such railway or to allow any particular applicant to construct one; and it might by its By-laws limit the number of such tracks to be laid on any particular street. But, by the

ramway upon any of the streets
same," etc.

Plaintiffs' Counsel that this
such railway, or one such
t the power thus given was
it enabled the Council to
particular street, under the
or bodies, as the Council
t.

y by-law, or the Corpora-
right to exercise any such
l do so without statutory

ght of the public generally
ercising its powers respect-
nt or the governing body
lso a public body, having

n obstruction to the free
ithout authority, it would
ilities afforded by such a
struction occasioned by it
the traffic of the streets.
that the laying down of
s for the conveyance of
way—that it is a change
. the Lewiston & Auburn
ctric Street Railway Co.,
reet Railway Company,
Company, 139 Penn. St.

rack under some circum-
fic of a street.
on this subject, was given
ne public interest. Cer-
f any such railway or to
t might by its By-laws
ular street. But, by the

Interpretation Act of Manitoba, C. S. M. cap. 1, sec. 7, s-s. 29,

> "Where power to make by-laws, regulations, rules or orders is conferred, it shall include the power to alter or revoke the same and make others if deemed expedient.

Any limit thus fixed by the Council, therefore, should be changed. Neither the Council nor the Corporation can change this Act of the Legislature, or lessen the authority thus given, unless under other statutory authority.

Any attempt to limit these powers would be an attempt to change the Constitution granted by the Legislature. These views appear to be supported by the decisions in Reg. v. The Governors of Darlington School, 6 Q. B., 682, 717 Mulliner v. The Midland Railway Company, 11 Ch. D. 611; Ayr Harbor Trustees v. Oswald, 8 App. C. 623; Vandecar v. East Oxford, 3 Ont. A. R., 151; Thomas v. The Rail Road Co., 101 U. S. 71.

But the express power thus given to alter or revoke By-laws is subject to the limitations in sec. 6 of the Interpretation Act,—

> "except in so far as the provisions thereof are inconsistent with the intent and object of such Act, or the interpretation which such provisions would give to any word, expression or clause, is inconsistent with the context."

Naturally, the power to authorize the construction of street railways involved the granting of a privilege under which money would be expended; and it would seem inconsistent with this that the Council should have power to withdraw the authority to construct in the midst of the work, or to render it nugatory by taking away any right of operation it might give, or by granting other privileges inconsistent therewith. There would, then, apparently be an implied limitation upon the power of the Council to pass by-laws authorizing such construction. But it seems impossible to limit express statutory power by implication to any greater extent than is absolutely necessary to attain the object of the Act, and any such implied restriction would seem to extend only to the authorizing or doing of acts directly interfering with the construction, maintenance and operation of the railway. It appears to me that, at most, there could not be thus implied any greater limitation upon the powers of the council than is involved in the Plaintiffs' own Act of Incorporation.

Now, that Act gave to the Plaintiff Company, subject to a condition precedent, a statutory right to construct and operate railways on the streets of Winnipeg, and to occupy and use so much of the streets as may be requisite for the purpose.

The condition precedent was the obtaining of permission from the City, which permission itself could be made conditional and be limited as to time.

The inconvenience involved in any attempt to have different sets of tracks,

, s-s. 29.

r orders is conferred, it shall
eemed expedient.

l be changed. Neither the
ne Legislature, or lessen the
thority.

ttempt to change the Con-
ppear to be supported by
on School, 6 Q. B., 682, 717
611; Ayr Harbor Trustees
Ont. A. R., 151; Thomas v.

oke By-laws is subject to

with the intent and object of
ny word, expression or clause.

street railways involved
e expended; and it would
ve power to withdraw the
o render it nugatory by
or by granting other
pparently be an implied
y-laws authorizing such
ress statutory power by
necessary to attain the
ld seem to extend only
with the construction,
o me that, at most, there
pon the powers of the
ncorporation.
subject to a condition
ways on the streets of
s may be requisite for

nission from the City,
limited as to time.
different sets of tracks,

KILLAM, J. managed by different persons or companies, upon, coincident, or nearly coincident portions of the street, suggest at once the necessity for some restriction of the powers of the Council, and that some such was contemplated by the Legislature further appears from the right of occupation given to the Plaintiff, and the provision in the fourteenth section requiring carriages and vehicles to turn off the track.

But by the terms of the Act itself the right to use and occupy the streets is a limited one. It is (section 9) limited to so much as

> "may be required for the purposes of their railway track, the laying of the rails and the running of the cars and carriages."

It is well settled that private acts, giving special privileges as against the public, are to be construed strictly. Proprietors of the Stourbridge Canal vs. Wheeley, 2 B. and Ad., 792; Gildart vs. Gladstone, 11 East, 685; Priestly vs. Foulds, 2 Sc. N. R., 228; Barrett vs. Stockton and Dover Railway Company, 2 Sc. N. R. 337, 3 Sc. N. R., 815, 8 Sc. N. R. 653. Upon no principle then does it seem possible to imply in the Corporation a right to contract its council out of the power to authorize the construction of street railways upon any portion of a street not actually required for the Plaintiffs' sets of tracks, switches, etc., and for the running of cars thereon.

The Plaintiffs' Counsel relies on the word "condition" in the 9th section, and the power to make "any agreement" conferred on the Council of the City by the 17th section of the Plaintiffs' Act, as giving the necessary authority. But here again the principle of strict construction applies. The word "condition" is one so frequently used in a loose sense that it may be very easy to imply from the context a much wider meaning than its proper one, as was done in Walker vs Hobbs, 23 Q. B. D., 458. But the natural signification of the word is that given to it in Ex parte Collins, L. R. 10 Ch. 372, and Ex parte Popplewell, 21 Ch. D., 73. Ordinarily it

> "Denotes something which prejudicially affects the interest of the donee."

The City was empowered to grant a permission upon condition, which certainly involves no authority to give something beyond a permission. And the agreements that might be made were confined to certain specific subjects, which are of such a nature as to suggest the reserving to the City authorities of certain rights and powers restrictive of the Plaintiffs' right of occupation, rather than the further limiting of the powers of those authorities. I cannot infer from the power to make any agreement on those subjects a power of the City Corporation to bind itself to give as consideration for beneficial convenants of the railway company on any of these subjects something otherwise beyond its powers. Could it

ent, or nearly coincident
r some restriction of the
ated by the Legislature
e Plaintiff, and the pro-
ehicles to turn off the

ad occupy the streets is

aying of the rails and the

es as against the public,
lge Canal vs. Wheeley,
Priestly vs. Foulds, 2
lway Company, 2 Sc.
no principle then does
tract its council out of
upon any portion of a
cks, switches, etc., and

" in the 9th section,
e Council of the City
ssary authority. But
e word "condition" is
y easy to imply from
as done in Walker vs
he word is that given
te Popplewell, 21 Ch.

the donee."
tion, which certainly
sion. And the agree-
ubjects, which are of
ities of certain rights
on, rather than the
infer from the power
City Corporation to
of the railway com-
s powers. Could it

KILLAM, J. be said, for instance, that it could pledge itself to establish and carry on the manufacture of rails or railway carriages for the purpose of supplying them cheaply to the Plaintiffs? Could it bind the Council to forego its police or sanitary powers by way of consideration for any such convenant? It is impossible to imply from such a clause, authority in the Corporation or the Council to divest itself of statutory powers to any greater extent than the nature of the subject matter necessarily involves. And the onus of establishing such authority must be thrown on the party asserting its existence. In my opinion, there is nothing even to suggest it.

Upon the other question, also, I think that the defendants are entitled to our judgment.

It has been contended that the maxim, Verba chartarum fortius accipiuntur contra proferentem should be applied in the construction of the By-law and Agreement upon which the plaintiff's case depends. So far as relates to the granting of the exclusive franchise claimed by the Plaintiff, I am not sure this would be a correct principle to adopt; that is, with an assumption that the grant of privileges is to be taken as, in the language of the granter, the city corporation. Many of the considerations applicable to private Acts of Parliament would seem to be involved. The council is very much in the position of a legislature assuming to bind the public. A private individual or company has the advantage in dealing with it. There is none on the other side equally interested to see that the rights of the public are preserved. Even the most honest and most capable members of the council seldom bring to bear in the public interest the same energy and astuteness which they exercise in their private affairs. The grant is frequently, if not usually, made in the language of the applicant, as in case of a private act of parliament. In this very case it appears that, in the course of the negotiations for the establishment of railways to be operated by electric power, the Plaintiff was asked to submit, and did submit a form of by-law for the consideration of the Council.

But however this may be, it does not appear to me that there is in these documents any real ambiguity which can require the application of the maxim.

The By-law begins with a recital of the Plaintiff's Act of incorporation, and the powers thereby given to the City and the Company to make an agreement for the construction and operation of a street railway. While this would not exclude the application of powers otherwise derived, it suggests very strongly that the object was the fulfilment of the condition upon which the Plaintiff's statutory right to occupy and use the streets for railway purposes depended.

The scheme of both By-law and Agreement appears to be this: that the

ablish and carry on the
f supplying them cheaply
police or sanitary powers
mpossible to imply from
ncil to divest itself of
e of the subject matter
thority must be thrown
ere is nothing even to

ndants are entitled to

rum fortius accipiuntur
on of the By-law and
far as relates to the
f, I am not sure this
assumption that the
the granter, the city
ivate Acts of Parlia-
in the position of a
lual or company has
er side equally inter-
ven the most honest
bear in the public
cise in their private
the language of the
very case it appears
t of railways to be
mit, and did submit

t there is in these
tion of the maxim.
incorporation, and
nake an agreement
ile this would not
ests very strongly
hich the Plaintiff's
ses depended.
e this: that the

KILLAM, J. grant of privileges is first made, and then the condition and limitations of the grant and the burdens upon the Company are set out. This is the more apparent in the Agreement, as the first clause alone purports to emanate from the City Corporation. The remainder purports to consist only of the covenants of the Company. This scheme, however, is not logically carried out, as in the 16th clause of the By-law and the corresponding clauses of the Agreement there is a grant of right of way and provision for the imposition of a penalty for obstructing the passage of cars. Even these, however, are apparently thus placed in connection with the limitation in favor of the public upon the right originally granted, and as if to make more clear the relative rights of the Company and the public.

Now what do these instruments purport to grant? There is, first, the permission to construct, etc., the railway lines and to run cars thereon, etc. Then follows the proviso making this subject to the subsequently mentioned conditions. Then the clause concludes with something not directly expressed in the statute—

> "and such railway shall have the exclusive right of such portion of any street or streets as shall be occupied by such railway."

It is not very easy to determine whether it was intentional, or by a mere slip that this right was granted to the railway, and not to the company. Undoubtedly it should be so read as to give the provision a reasonable effect. It is possible that it was thus put, although clumsily, to show that it was to exclude other railways. It is noticeable, also that, while the statute gave a right

> "to use and occupy,"

the streets, or portion thereof, so far as requisite, conditionally upon the grant of permission by the civic corporation, the By-law and Agreement grant no such permission in those terms. Apparently, this "exclusive right" took the place of that portion of the Statute, and was substituted in order to make it more clear that the right of occupation was to be excluded as against all but the ordinary public traffic of the streets, or as against other railways. This exclusive right is not an exclusive right to occupy all the streets of the City, or the whole of any street, for railway purposes or otherwise. It is,

> "the exclusive right of such portion of any street, or streets, as shall be occupied by said railway."

The grammatical connection of the word "as" is with "such." It is

> "such portion . . . as shall be occupied."

The exclusive right is, by the very terms of the provision, limited to a portion of a street or streets.

The first question naturally, is, in what sense is this word "occupied"

s.

ondition and limitations of the
out. This is the more apparent
rts to emanate from the City Cor-
ly of the covenants of the Com-
ried out, as in the 16th clause of
Agreement there is a grant of a
of a penalty for obstructing the
ently thus placed in connection
e right originally granted, and
e Company and the public.
rant? There is, first, the per-
run cars thereon, etc. Then
equently mentioned conditions.
ctly expressed in the statute—

of such portion of any street or

intentional, or by a mere slip
t to the company. Undoubt-
n a reasonable effect. It is
o show that it was to exclude
the statute gave a right

nditionally upon the grant of
Agreement grant no such per-
right" took the place of that
o make it more clear that the
but the ordinary public traffic
clusive right is not an exclu-
ne whole of any street, for

s, as shall be occupied by said

"such." It is

ccupied."

sion, limited to a portion of

is this word "occupied"

KILLAM, J. employed? How should the "railway" be said to occupy the street? Or, if by "railway" is meant, in both cases "railway company," how should the railway company be said to occupy the streets?

In the case of the Pimlico etc., Tramway Co. v. The Assessment Committee of the Greenwich Union, L. R. 9 Q. B. 9, it was held that the tramway company had not a mere easement or right to pass over the streets, but that it was an occupier of the part used. Lush, J., said

> "The Act of Parliament enables the proprietors of a tramway to appropriate to their own purposes a given portion of the public road for the purpose of laying down tram rails which are necessary for the conveyance of their cargoes along the line of road; the tram rails occupy a portion of the soil, they are exclusively used by the tramway company for the purpose of the tramway, and that, I think, makes them occupiers of that portion of the soil. I do not think they are the less occupiers because the public have the right of passage of the surface of their iron road. The road as a tramway is in their exclusive use, and used for their exclusive benefit; therefore, I agree in thinking that they are occupiers."

And Quain, J., said

> "I am unable to distinguish the iron tram rails from the gas and water pipes; both physically occupy the soil; one is somewhat deeper than the other, the tram rail having the upper surface level with the road; but they both occupy the soil of the road physically, and in exactly the same manner."

By the Plaintiffs' Act the Company was given power conditionally to

> "occupy any and such parts of any of the streets as may be required for the purposes of their railway track, the laying of the rails and the running of their cars and carriages."

The occupation here referred to is evidently a physical occupation similar to that referred to in the Pimlico Company's case.

By the third clause of the By-law and the corresponding clause of the Agreement, the Company was bound to pave, etc., the portion

> "occupied by the track or tracks"

and a portion extending eighteen inches on each side thereof. Apparently, taking with this the previous part of the clause requiring the Company to keep in order

> "the roadway between and at least eighteen inches outside of each rail"

and the description of the railway in the Statute and By-law as a double or single track iron railway, the word "track" covered the two rails necessary to support a car and the space between the rails. In this case, also, the reference was to the physical occupation authorized by the Statute.

When the Plaintiffs' railway was first constructed it consisted of a single track, composed of two lines of rails built upon ties eight feet in length, placed at right angles to the rails. The streets were afterwards paved, and in some portions the Company laid two sets of tracks, but was compelled to pay for paving eight feet in width for one set of tracks only. This space appears to represent approximately the width of street required for the passage of cars and the portion

occupy the street? Or, if by
ny," how should the railway

The Assessment Committee
that the tramway company
streets, but that it was an

way to appropriate to their own
ing down tram rails which are
road; the tram rails occupy a
company for the purpose of the
of the soil. I do not think they
ge of the surface of their iron
ed for their exclusive benefit;

e gas and water pipes; both
the tram rail having the upper
oad physically, and in exactly

ver conditionally to

required for the purposes of
ars and carriages."

occupation similar to that

nding clause of the Agree-
n

reof. Apparently, taking
Company to keep in order

de of each rail"

By-law as a double or
two rails necessary to
case, also, the reference
.

it consisted of a single
feet in length, placed at
red, and in some portions
to pay for paving eight
ars to represent approx-
cars and the portion

KILLAM, J which, in respect of each track and side track the Plaintiff Company was authorized to occupy and use. At any rate, even if more space in width were required, it sufficiently appears that there is ample room for the passage of the Plaintiffs' cars without interference, except at and near crossings by the cars of the other Company.

I agree entirely with the contention of the Plaintiffs' counsel, that the Agreement is not to be construed by reference to a particular clause alone, but the whole tenor and object of the Agreement and every clause in it must be considered for the purpose of the construction of each clause. So far I have referred to the indications offered by the Plaintiffs' Act of Incorporation, the apparent object of the By-law and Agreement, and the language of the particular clause under which the Plaintiffs' claim mainly arises. The only portion of the By-law or the Agreement which can by any possibility suggest that a wider meaning should be given to the first clause, or which, in default thereof, can itself give the right claimed, is the twenty-fifth clause of the By-law and the corresponding one in the Agreement. That clause reads,

> "In the event of any other parties proposing to construct street railways on any of the streets not occupied by the parties to whom the privilege is now to be granted, the nature of the proposal thus made shall be communicated to them, and the option of constructing such proposed railway on similar conditions as are herein stipulated shall be offerd: but if such preference is not accepted within two months, then the Corporation may grant the privilege to any other parties."

The object of this provision appears clear enough. The Statute had given to the Plaintiffs a general right to construct railways on the streets of Winnipeg, subject to the condition that permission should be obtained from the civic Corporation. The By-law and the Agreement granted a general permission as to all streets not particularizing or excepting any. The only provision made for the revocation of this permission during the original twenty years of the grant, even as to streets not built upon, is that contained in this twenty-fifth clause. With no power to revoke it, there might be great difficulty in getting others to build on streets having no railway. The Plaintiffs might refuse to build or to renounce its right to do so. On most of the streets it would be so inconvenient as to be practically impossible to operate satisfactorily several sets of railway tracks. This served as a protection to the Plaintiffs, and at the same time made it desirable that the civic authorities should be able to determine the Plaintiffs' right so that the Company could not insist on duplicating lines to the inconvenience of the public.

There is one possible construction of the twenty-fifth clause which may seem inconsistent with the retention of a right to authorize the construction of other lines upon the same street with the Plaintiffs. The clause applies to streets

aintiff Company was
e space in width were
or the passage of the
ssings by the cars of

ounsel, that the Agree-
clause alone, but the
it must be considered
I have referred to the
apparent object of the
clause under which
By-law or the Agree-
eaning should be given
ve the right claimed,
ng one in the Agree-

ailways on any of the
nted, the nature of the
tructing such proposed
if such preference is
privilege to any other

tute had given to the
s of Winnipeg, subject
he civic Corporation.
sion as to all streets
made for the revoca-
he grant, even as to
h clause. With no
g others to build on
build or to renounce
aconvenient as to be
s of railway tracks.
time made it desir-
the Plaintiffs' right
to the inconvenience

clause which may
the construction of
use applies to streets

KILLAM, J. not occupied by the Plaintiffs. This might mean all that are not thus wholly occupied. The expression might possibly include even streets on which the Plaintiffs' lines are built, but the whole of which those lines do not occupy in the sense which I have already given to the word. This would involve the idea that the option had to be given to the Plaintiffs of constructing other lines alongside its own, in the event of others seeking to do so. I cannot, however, think that this was intended. The evidence shows that, on two streets at least, there was ample room for more tracks than the Plaintiff Company had power to construct. The Plaintiffs' corporate power was at most to construct two sets of tracks with switches, etc. Permission was given to construct these. The twenty-fifth clause could not have been intended to extend this. I cannot read it as adding to the Plaintiffs' rights, but merely as enabling the civic authorities to revoke in certain cases the permission given. It is, apparently relied on, chiefly as showing that the exclusive right given by the first clause extended to the whole width of the street Viewing the object of the clause as I do, I cannot ascribe to it this effect. The use of the word "occupied" is somewhat ambiguous, but I am unable to imply from it, or from the clause as a whole, the necessity for giving to the first clause a wider meaning than that which for the reasons given it seems to have.

The laintiffs' counsel contends that the privilege granted to the Plaintiffs, Company is a franchise, which should be deemed to be exclusive, on the principle of a ferry franchise. Properly speaking, a franchise is derived from a grant of the Crown, or exists by prescription which presupposes such grant, 2 B. Com. 37; 13 Vin. Abr. tit. Franchise, p. 508. At Common Law a ferry was unlawful without a license from the Crown, Blisset v. Harte, Willes, 512; Jellett v. Anderson, 9 S. C. R. 17. Such a franchise, once granted, was regarded as property of which the grantee could not be divested by similar grants to another, 13 Vin. Abr. tit. Franchise, 508; Bl. C 264. But the case of Letton v. Goodden, L. R. 2 Equity, 123, shows that the incident of exclusiveness does not necessarily extend to every public ferry.

I concur in the view expressed in the Chicago City Railway Company v. The People, 73 Ill. 541, that the grant by the Municipal Corporation in such a case is a grant of a mere license, and not of a franchise. The franchise, if the term be a proper one, was granted by the Legislature. It may be doubted whether any such franchise, except that of incorporation, could have been granted by the Crown. At any rate I know of no authority for the view that a legislative grant of authority to carry passengers on land, whether by rail or other special method, and whether on or off a highway, is prima facie, exclusive. It seems inconsistent with modern ideas to imply such an incident, as well as with

are not thus wholly
treets on which the
do not occupy in the
involve the idea that
ther lines alongside
however, think that
at least, there was
power to construct.
sets of tracks with
twenty-fifth clause
it as adding to the
o revoke in certain
ty as showing that
hole width of the
ibe to it this effect.
t I am unable to
giving to the first
it seems to have.
to the Plaintiffs,
e, on the principle
from a grant of
grant, 2 B. Com.
ry was unlawful
Jellett v. Ander-
ed as property of
another, 13 Vin.
. Goodden, L. R.
not necessarily

ay Company v.
ation in such a
The franchise, if
ay be doubted
ve been granted
that a legisla-
y rail or other
, exclusive. It
as well as with

KILLAM, J. the principles of construing private acts of parliament. It appears, however, to be clear that in this instance, the Legislature did not intend to grant to the Plaintiff Company the exclusive franchise or privilege of constructing and operating street railways in Winnipeg, and of taking tolls from all who might desire to use that method of conveyance. Three days after the passage of the Plaintiff's Act it gave to the City Council extended or clearer powers to authorize such railways generally. These provisions were contained by the City Charter of 1884, 47 Vic., c. 78, s. 149, s.s. 129, and were copied into the Municipal Acts after the City was brought under their operation. See 49 V. c. 52 s. 349, s.s. 68 (M. 1886), 53 Vic. c. 41, s 376, s.s. 41 (M. 1890)and R. S. M., c. 100, s. 695, s.s. (f). I do not think then we can infer an intent to exclude the contruction of such other lines on the same parallel streets with those on which the Plaintiffs might build. Although, as I have said, the width of some streets is shown to be such that room was left outside the portions occupied by the Plaintiff's line for the construction of other lines, yet it is doubtful whether such could have been laid down to advantage without crossing the Plaintiff's lines at some point. At any rate it appears that the Defendant Company has found it necessary or advantageous to make such crossings. These are the only points at which the new Company appears to have directly interfered with the Plaintiff's lines, or to have encroached on the portions of the streets occupied by the Plaintiffs. These crossings are of two kinds, those made for the operating of lines alongside the Plaintiff's, and those for the purpose of connecting with lines on other streets Were it not for the Statute 55, Vic., c. 56, s. 33, such interference and encroachment would seem unlawful. By that Act, however, the Defendant Company was authorized, subject to the provisions of the Manitoba Railway Act, to make such crossings, notwithstanding any rights of the Plaintiff Company. The Bill distinguishes between two kinds of crossings mentioned, and asks particularly for an injunction against any but the latter kind. It does not appear to me that it is possible to make any difference in this respect. It is doubtful whether, apart from the Statute last referred to, the provisions of the Railway Act, R. S. M. cap. 130, s-s 26-30, respecting railway crossings, would apply to such railways as those now in question. But the Statute seems now to make these provisions applicable, and to warrant the Defendant Company in contructing such crossings, and in operating its railway lines by means thereof over and across the Plaintiff's lines, under an Order of the Railway Committee of the Executive Council. It has not been disputed that such an order was made authorizing all these crossings, or that the crossings conform to the Order.. Upon the argument in chief no question was raised as to the validity of the Order, but in reply some

appears, however, to
end to grant to the
structing and operat-
ll who might desire
assage of the Plain-
ers to authorize such
the City Charter of
Municipal Acts after
52 s. 349, s.s. 68 (M.
00, s. 695, s.s. (f). I
contruction of such
the Plaintiffs might
s shown to be such
intiff 's line for the
ould have been laid
ome point. At any
ecessary or advant-
at which the new
ff's lines, or to have
Plaintiffs. These
lines alongside the
s on other streets
ence and encroach-
efendant Company
ilway Act, to make
ompany. The Bill
asks particularly
appear to me that
doubtful whether,
Railway Act, R. S.
ly to such railways
e these provisions
ructing such cros-
ver and across the
of the Executive
de authorizing all
pon the argument
but in reply some

KILLAM, J. such were suggested Being raised in this way only and not really argued I do not consider them.

The bill, also, alleges that the Plaintiff Company desires to make extensions of its line to certain other named streets, and asks an injunction against the operation by the Defendant Company of any street railway on those streets, and also a declaration that the Plaintiff has the first right to build and construct street railways on any of the streets of Winnipeg not already occupied by the Plaintiff, and that the new Company has no right to occupuy such streets until the Plaintiff has been offered the privilege of constructing the same, and has not accepted the offer within two months, and also that the City Corporation may be restrained by injunction from giving any consent to such user of the streets, to which the Plaintiff desires to extend its lines until the Plaintiff has neglected for two months to accept the offer or proposal to build on the same.

Upon these points some attempt was made by counsel for the Defendants to show that upon the evidence the prescribed offer had been made to the Plaintiff. This however appears to me not made out, nor does it appear that any right to such an offer has been in any manner waived. On the other hand, it is not shown that the Plaintiff Company has submitted to the City engineer, or other authorities, any plans of location or construction on new streets, or otherwise taken any overt act towards making such extensions. It is, I think, the necessary result of the opinions I have already expressed that the Plaintiff Company is entitled to no such relief. I regard the twenty-fifth clause, already discussed, as merely affording a means of revoking in part the original permission given to the Plaintiff Company, whose right to so extend its line appears still to exist, but not yet to be definitely disputed. If it shall see fit to make any attempt in that direction, and it be found that the works of the Defendant Company interfere with such extensions, or if that Company, or the Civic Authorities, try to prevent the same, then will be the time to consider the Plaintiffs' rights in that respect.

The Bill also asks that it be declared that the City had no authority to deprive itself of, or to contract away, its right to permit the Plaintiff to use electricity as the motive power for propelling street railway cars. Upon this point, also, no argument has been attempted, and it does not seem that we should express any opinion upon it.

I wish to add that, although I have made reference to scarcely any of the numerous cases in the American reports, to which we have been referred, I have examined and considered nearly all of those which have any bearing upon the point that I have been discussing, and particularly those cited in behalf of the

really argued I do

make extensions
action against the
those streets, and
ld and construct
occupied by the
uch streets until
ame, and has not
poration may be
the streets, to
as neglected for

the Defendants
made to the
ppear that any
ther hand, it is
ty engineer, or
reets, or other-
s, I think, the
the Plaintiff
clause, already
iginal permis-
line appears
fit to make
he Defendant
or the Civic
consider the

y to deprive
electricity as
nt, also, no
express any

any of the
rred, I have
upon the
half of the

KILLAM, J. Plaintiffs. They are very interesting and instructive, but in any intelligent discussion of them it would be necessary to point out certain distinctions between our Constitution and that of the United States, and their effect upon the decisions.

As this could not alter the result, and as, without this, the case could be disposed of on what has seemed to us to be proper principles, I have thought that no good purpose would be served by undertaking the task.

I agree that the Order dismissing the Bill should be affirmed with costs.

In the Privy Council.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA,

BETWEEN

THE WINNIPEG STREET RAILWAY COMPANY..... *Appellants*

AND

THE WINNIPEG ELECTRIC STREET RAILWAY COMPANY AND THE CITY OF WINNIPEG ..... *Respondents*

CASE FOR THE RESPONDENTS—THE WINNIPEG STREET RAILWAY COMPANY.

(Draft).

1. This appeal is from the unanimous decision of the full Court of Queen's Bench of the Province of Manitoba, (Taylor C. J., and Dubuc and Killam J J.) pronounced on the 13th May, 1893, affirming the decision of Mr Justice Bain of that Court pronounced 12th December, 1893, dismissing the Plaintiffs' Bill with costs.

2. The suit was commenced on the 27th day of July, 1892, mainly to obtain a declaration that the Plaintiffs were entitled to the exclusive right to the use for tramway purposes for 20 years from 12th June, 1882, of the whole of Main Street, and Portage Avenue in the City of Winnipeg upon which the Plaintiffs were running their street cars, and asking for an injunction against the Defendant Company from operating tramways on those streets. The Bill of complaint also asked that the Defendant Company might be restrained from operating tramways upon certain other streets in Winnipeg known as Central Avenue, 14th Street North and 8th Avenue North streets, 17th Avenue North and 24th Street North on which the Plaintiffs had no lines, the plaintiffs claiming that under the By-law and Agreement and their Act of Incorporation below referred to, they had the first right to build and construct street railways upon any street in the City of Winnipeg, and that the Defendant Company had no right to occupy same for street railway purposes, or the City to grant that privilege, until the Plaintiffs had been offered the privilege of constructing same and had not accepted such offer within two months.

ANITOBA,

... *Appellants*

Y

. . *Respondents*

EET

ull Court of
Dubuc and
ision of Mr
smissing the

y to obtain a
the use for
Main Street,
intiffs were
Defendant
nplaint also
ating tram-
venue, 14th
24th Street
that under
w referred
ays upon
npany had
grant that
cting same

3. The substantial questions with reference to the two branches of the Plaintiffs' case referred to in the last paragraph are (1) whether the City Council had power to grant the Plaintiffs a monopoly or exclusive rights under the Statutes below referred to; (2) whether they actually granted such rights by the By-law and Contract, the terms of which are below set forth; and (3) whether there was power in the City to agree with the Plaintiffs that no right to build tramways should be given to other parties proposing to build on streets not built upon by the Plaintiffs until two months after the Council had offered such right to the Plaintiffs.

4. The City of Winnipeg was incorporated by the Manitoba Legislature on the 14th day of May, 1875, by a special Act of Incorporation, Chapter 50 of that year. By sub-section 5, section 107 of that Statute the City was authorized to pass by-laws

> "for regulating and governing street railway companies and fixing the rates to be charged thereon."

This Statute was amended by the Manitoba Statutes of 1877, 1878, 1879 and 1881, but the only statute important to be noted in connection with the matters in question here, is the Statute chapter 26, Manitoba Statutes of 1882, which was assented to on the 30th day of May, 1882, consolidating the Acts relating to the City and which contained the following clause relating to tramways:—

> "CLIV. The Council may pass by-laws.
>
> 7. For authorizing the construction of any street railway or tramway upon any of the streets or highways within the City and for regulating and governing the same and for fixing the rates to be charged thereon."

The City of Winnipeg has ever since had the power contained in this sub-section, it being repeated in the same words in section 149, sub-section 129, chapter 78 of the Statutes of 1884; section 349, sub-section 68, chapter 52, of the Statutes of 1886; section 376, sub-section 41, chapter 51 of the Statutes of 1890; and in the present Municipal Statute of the Province, section 605, sub-section f, chapter 100 Revised Statutes of Manitoba, 1891.

The Statute chapter 26 of 1882, also contained the following sections (155 and 156).

> "155. Every public street, road, square, lane, bridge or other highway in the city, shall be vested in the city subject to any rights of the soil which the individuals who laid out such road, street, bridge or highway, reserve."
>
> "156. Every such public street, road, square, lane, bridge and highway, shall be kept in repair by the corporation."
>
> "(l). All persons having made reservations in any street, road, or bridge, shall apply within six months after the passing of this Act to the City Council, in order to obtain a final settlement and adjustment under the provisions of this Act as hereinafter provided of such claim, otherwise such claim shall cease to exist."

5. The Plaintiffs' claim to the exclusive privileges asserted in the Bill of Complaint is founded upon By-law number 178 of the City of Winnipeg passed by the

Council of the City on the 12th day of June, 1882, and an agreement entered into under that By-law by the City of Winnipeg with the Plaintiffs on the 7th. day of July, 1882, the By-law purporting to be passed and the agreement entered into under the above mentioned Sta[illegible] of Manitoba, chapter 37 of 1882. This Statute is the Act of Incorporation of th[illegible]aintiffs, and was obtained from the Legislature on their petition for that purpose, the recital of the Act being as follows:—

"Whereas certain [illegible]ave by their petitions prayed that they may be incorporated under the title of "The Winnipe[illegible]ilway Company," for the purpose of operating street railways in the City of Winnipeg and the [illegible]of St. Boniface East and West, St. John, St. James and Kildonan, with power to make extensions along streets and roads in the said City and Parishes, and with all powers necessary in connection therewith, and to amalgamate with any other street railway company or companies."

6. The clauses of this Statute relied upon by the Plaintiffs as supporting the power of the Council of the City of Winnipeg to pass the By-law above referred to are as follows:—

"VIII. The Company are hereby authorized and empowered to construct, maintain, complete and operate, and from time to time remove and change a double or single track iron railway, with the necessary side tracks, switches and turn-out for the passage of cars, carriages, and other vehicles adapted to the sa[illegible]d and along any of the streets or highways in the City of Winnipeg, and the Parishes of St. Boniface East and West, St. John, St. James and Kildonan, or any of them, and to take, transport and carry passengers upon the same, by the force or power of animals, or such other motive power as may be authorized by the council of the said city, and the Municipalities or any of them in which said Parishes, or any of them, or any part of one or more of them are or is situated respectively by by-law, and outside the limits of the City of Winnipeg, to carry freight and to use and construct and maintain all necessary works, buildings, appliances and conveniences therewith connected."

"IX. The Company shall have full power and authority to use and occupy any and such parts of any of the streets or highways aforesaid, *as may be required for the purposes of their railway track, the laying of the rails and the running of their cars and carriages;* prov[illegible]ed always that the consent of the said city and municipalities respectively, shall be first had and obtained, who are hereby respectively authorized to grant permission to the said Company to construct their railway as aforesaid, within their respective limits, across and along, and to use and to occupy the said streets or highways, or any part of them, *for that purpose, upon such condition, and for such period or periods as may be respectively agreed upon between the Company and the said City,* or other municipalities aforesaid, or any of them."

"XVII. The council of the said city and of any of the municipalities in which said parishes, or in which any of them, or any part of one or more of them are or is situated, and the said Company are hereby respectively authorized to make and to enter into *any agreement or covenant relating to the construction of the said railway,* for the paving, macadamizing, repairing and grading of the streets or highways, and the construction, opening of and repairing of drains or sewers, and the laying of gas and water pipes in the said streets and highways, the location of the railway and the particular streets along which the same shall be laid, the pattern of the rails, the time and speed of running the cars, (the amount of licenses to be paid by the Company annually), the amount of fares to be paid by passengers, the time within which the works are to be commenced, the manner of proceeding with the same and the time for completion, and generally for the safety and convenience of the passengers, the conduct of the agents and servants of the Company, and the non-obstructing or impeding of the ordinary traffic."

"XVIII. The said City and the said Municipalities are hereby authorized to pass any by-law or by-laws and to amend, repeal and enact the same, for the purpose of carrying into effect any such agreements and covenants, and containing all necessary clauses, provisions, rules and regulations for the conduct of all parties concerned, and for the enjoining obedience thereto, and also for the facilitating the running of the Company's cars, and for regulating the traffic and conduct of all persons travelling upon the streets and highways through which the said railway may pass."

7. The clauses of the By-law No. 178 of the City of Winnipeg (repeated in the

same words in the Agreement referred to) on which the Plaintiffs rely for the grant of the exclusive right and the right to prevent the building of rival lines on the streets not built upon by them are clauses 1 and 25 of the By-law, in the ollowing words :—

"1. The Winnipeg Street Railway Company are hereby authorized and empowered to construct, maintain, complete and operate, and from time to time remove and change a double or single track railway with the the necessary side tracks, switches and turn-outs for the passage of cars, carriages, and other vehicles adapted to the same, upon and along any of the streets or highways of the City of Winnipeg, and to run their cars, take transport and carry passengers upon the same, by the force or power of animals or such other motive power as may be authorized by the said council of the said city, and on the terms and under the conditions and relations hereinafter contained in this by-law, and subject to the same, *and such railway shall have the exclusive right to such portion of any street or streets as shall be occupied by said railway*, and shall be worked under such regulations as may be necessary for the protection of the citizens of said city."

"25. In the event of any other parties proposing to construct street railways on any of the streets not occupied by the parties to whom the privilege is now to be granted, the nature of the proposal thus made shall be communicated to them, and the option of constructing such proposed railway, on similar conditions as are herein stipulated, shall be offered, but if such preference is not accepted within two months, then the corporation may grant the privilege to any other parties."

8. The Defendant Company in their answer and at the hearing disputed :—

(1) The power of the Council of the City to grant any monopoly or exclusive right to the Plaintiffs to the whole of any street for tramway purposes under the Statutes above quoted relating to the City and Company; such grant involving an agreement on the part of the City, to refrain from exercising their corporate powers during the period mentioned, 20 years.

(2) That any grant or exclusive right to the whole street was made or intended to be made,—the exclusive right being expressed in clause 1 of the By-law only with reference to the portion of the street occupied by the railway, thus leaving the remaining portion of the street free for other companies.

(3) The power of the City Council to pass the 25th clause of the By-law it being an unauthorized restriction on the legislative powers of the City Council and if there was power to pass it, that there was any breach of it.

(4) That there had been any breach of the contract of the Plaintiffs with the City or the terms of their By-law,—the Defendant Company's lines being operated by electricity and the Plaintiffs' lines by animal power.

(5) That this was a proper case for injunction.

(6) The Defendant Company also claims that the Plaintiffs waived any alleged, rights by their laches and delay, having allowed the Defendant Company's works to proceed and great expense to be incurred before this suit for an injunction, and by delay in prosecuting such suit.

(7) And that the Plaintiffs' Agreement was never binding upon the City, it not being such an agreement as was authorized by the By-law. The answer of the Defendants the City of Winnipeg sets up practically the same defences.

rely for the
rival lines
-law, in the

construct,
track rail-
, and other
nipeg, and
of animals
the terms
the same,
ed by said
he citizens

the streets
posal thus
on similar
ithin two

isputed :—
r exclusive
under the
involving
corporate

de or in-
ne By-law
way, thus

e By-law
y Council

with the
operated

y alleged,
works to
n, and by

City, it
swer of
nces.

10. The Defendant Company assert their right to construct and operate tramway lines in Winnipeg under By-law number 543 passed by the Council of the City of Winnipeg on the 1st. day of February, 1892, and contract thereunder granting such right to James Ross and William McKenzie. The rights under this contract were afterwards, as permitted by clause 33 of the By-law, transferred to the Defendant Company and By-law 543 was ratified and confirmed by Statute of the Legislature of Manitoba, clause 34, chapter 56, passed in the year 1892 as follows:—

> "34. By-law No. 543 of the City of Winnipeg, entitled 'A By-law of the City of Winnipeg respecting Electric Street Railways,' a copy of which by-law is Schedule "A" hereto, is hereby validated and confirmed in all respects as if the said by-law had been enacted by the Legislature of this Province, and the said Company shall be entitled to all the franchises, powers, rights and privileges thereunder."

11. This Statute incorporating the Defendant Company and confirming By-law 543 was opposed by the Plaintiffs before the Private Bills Committee of the Legislature, but was passed with full knowledge of the claim of the Plaintiffs and contains this provision in clause 33:

> "33. Nothing in this Act or the Schedule thereto shall in any way affect or take away any right held by vested in or belonging to the Winnipeg Street Railway Company, if any such there be, but any such right may be held and exercised by the Winnipeg Street Railway Company as fully and effectually as if this Act had not been passed, but nevertheless the Winnipeg Electric Street Railway Company shall have power to cross, build and operate its line of railway across the lines of the Winnipeg Street Railway Company subject to the provisions of the Manitoba Railway Act."

12. By-law 543 had been passed by the City Council granting the powers therein mentioned to James Ross and William McKenzie after open, fair and public competition between them and the Plaintiffs, for the privileges in question, in which they and the Plaintiffs had each deposited $10,000 with the City as earnest of their *bona fides*, and after full consideration by the City Council of the merits of their respective propositions, the negotiations having lasted a number of months and each party having submitted proposals of terms they were willing to accept for the franchise. The powers given by By-law 543 are expressed to be (clause 1)

> "subject to the legal rights of the Winnipeg Street Railway Company"

and a similar statement is contained in the first recital of the By-law.

13. At the time of the passing of the Plaintiffs' Act of Incorporation, Winnipeg was, and is now, the capital of the Province of Manitoba, and was then a place of about 25,000 people, its population largely increasing at that time. Its present population is about 30,000. The two principal business streets are Main Street and Portage Avenue, each having a width of 132 feet, the other streets in question having a width of 66 feet. A considerable part of the Bill of Complaint is devoted to charging that it was inconvenient in the public interest and unsafe for the public that two rival lines of tramway should be operated on one street, each

having double lines on Main Street. Some evidence was given on both sides at the hearing on this point, but Mr. Justice Bain, before whom the cause was heard, and witnesses examined held against the Plaintiffs and his finding was concurred upon this point by the three Judges of the full Court on the appeal, so that the objection does not seem to be of importance.

14. The Defendant Company commenced construction of their lines on the 29th of May, 1892, and before the Bill was filed had their line of tramway constructed and in operation from the Canadian Pacific Railway line on Main Street north to 17th Avenue North, then along 17th Avenue North to 24th Street North, and then southerly along 24th Street North to the Exhibition Grounds, these lines being ready for operation and being first operated on the 25th of July, 1892. The tramway on the rest of Main Street was then proceeded with, and was completed, together with the line on Portage Avenue, and the lines on Central Avenue, 14th Street North and 8th Avenue North.

15. The Defendant Company's lines are single lines of tramway, except the Main Street line which is a double line, the single lines having switches and turnouts to enable the cars to pass. The lines of the Defendant Company are separated from those of the Plaintiffs' on Main Street and Portage Avenue by distances which enable same to be operated without danger or inconvenience (see as above stated judgment of Bain J. affirmed by full Court on appeal). The total length of the lines of the Defendant Company at present constructed is eight and a half miles, and the total length of the Plaintiffs' lines about the same.

16. The question of the power of the Council of the City of Winnipeg to grant the Plaintiffs exclusive rights, turns altogether upon the provisions of the Statutes above quoted (the City's Act of Incorporation 45 Vic. Chap. 36) and the Plaintiffs' Act of Incorporation (45 Vic. Chap. 37). All the powers of the City of Winnipeg and its Council have been conferred by Statute and its powers are minutely set forth in the various Statutes conferring its powers. Up to the year 1886, these powers were contained in the Acts above mentioned, being its Act of Incorporation and the various Statutes amending same. In 1886 by Chapter 52, Manitoba Statutes of that year, there was a consolidation of the Acts relating to Municipalities of the Province, including the City of Winnipeg, and the same system was pursued of enumerating in detail all the powers intended to be conferred or exercised. This Statute was repealed in 1890 by "The Municipal Act" Chapter 51 of the Manitoba Statutes of that year adopting and continuing the same system. The General Municipal Act now in force, Chapter 100, Revised Statutes of Manitoba is a revision and practical continuation of the Act of 1890

17. The City of Winnipeg being the creature of Statute, and having enumer-

ated and well defined statutory powers and duties with deference to tramways and many other subjects, the Defendants contended it had no powers except those given in express words or by necessary implication. Its powers as to authorizing the construction of tramways on the City Streets were, outside of the Plaintiffs' Act of Incorporation, derived from the City Charter of 1882, Cap. 26, sub-section 7, section CLIV., above quoted, giving power to do three things :

(1) "To authorize the construction of any street railway."
(2) "and for regulating and governing the same."
(3) "And for fixing the rates to be charged thereon."

It is plain that nothing in this section authorized the giving of exclusive rights. The power to authorize, or regulate and govern does not imply power to agree that similar privileges shall not be given to other companies or persons. This clause authorized the City to confer tramway privileges upon any person or upon any tramway company, and was passed in the same session of the Legislature as the Plaintiffs' Charter, and was in force before the Plaintiffs' By-law was passed, and mentioned one of the subjects upon which it was the duty of the City Council to legislate impartially and as often as the good of the City might require, and such power was not capable of being bargained away.

18. The Plaintiffs' contention that it was intended that the City Council should have the right to agree to exclusive rights in favor of the Plaintiffs is mainly founded on the proviso, in section 9 of their Act of Incorporation. The first part of this section is what may be called the granting part of the section. The Legislature grants the power to construct tramways on the streets, and limits the power to

"such parts of any of the streets as may be required for the purposes of their railway track, the laying of the rails and the running of their cars and carriages."

Then follows the proviso, making the exercise of the powers given by the Legislature conditional on obtaining the consent of the City.

"Provided always that the consent of the said City . . . shall be first had and obtained, who are hereby authorized to grant permission to the said Company to construct their railway as aforesaid . . . and to use and occupy the said streets or highways or any part of them for that purpose, upon such condition and for such period or periods as may be respectively agreed upon etc."

The function of the City is merely the giving of a license. The power to construct and operate is not given by the City. That comes from the Legislature ; the consent of the City being necessary only as a condition to the exercise of the state-given power, and the City having power to impose conditions of a lawful and authorized nature on the Company at the time of giving the license. This proviso introduces a limitation, and was not intended to enable the City to give

the Company more than the Legislature had already given, or to enable the City to impose a condition on itself which should abridge its future legislative action, as to other companies. The words "upon such condition" in the proviso have a well defined meaning. They give the City power to impose restrictions on the Company's exercise of the right. The City had the power to authorize other tramways as one of its legislative powers. It could not have been intended to give the City power to abdicate merely its power on this subject because the Plaintiff Company obtained an Act of Incorporation. The contention of the Plaintiffs is that the words of this proviso were intended to enable the City to contract away the right to authorize other tramways, a power expressly conferred on the City as a statutory corporation for public purposes.

19. Assuming that there was any doubt as to the meaning of these statutory provisions, when considered with the powers given the City by its Charter of Incorporation, it is submitted that the rule usually applied to Acts of incorporation of Companies such as this, must be applied to resolve such doubt in favor of the public. This Statute was passed on the petition of the promoters of the Plaintiff Company, and should be considered as a contract in which the words are those of the promoters, and any doubt or ambiguity will operate against the Company.

20. It is submitted to be the rule applied to Municipal Corporations, when dealing with matters affecting public right, and especially highways, to confine them strictly to the powers assigned, and implications by which powers are claimed to exist which are not expressly given, are not favored, and not admitted unless unavoidable. It was contended, on behalf of the Plaintiffs, that the powers of the City to give an exclusive license must be implied, as otherwise parties could not have been got to invest capital in the enterprise. Mr. Justice Bain, in his Reasons (Record P), says, after considering the evidence:

> "At the time it (the contract) was entered into, Winnipeg was a new and growing town, with a population of about 25,000, and it is well known that at that time it was expected the population would increase much more rapidly than it has. Main Street and Portage Avenue are streets of unusual width, having a uniform width of 132 feet, and the other streets that have been referred to have a width of 66 feet. At this time none of the streets had been paved, and it is shown that in the spring and fall and in wet weather the streets often became almost impassable for ordinary vehicles. These are about the only facts shown that bear upon the question, and while it may be inferred from them that the City would be desirous of having street railways introduced, they fail to suggest to me any such conclusion as that it was necessary in order that the City might come to an agreement with the Plaintiffs to build and operate street railways, it should be able to give the Plaintiffs exclusive rights * * * And there is nothing to show either, that at the time the Agreement was made, the City, on account of its inability to induce the Plaintiffs, or others, to undertake the construction of street railways, had either (1) agree to give the Plaintiffs a monopoly or to do without railways; and I cannot find that from considerations of this sort, or any other, it was necessary that the City should have the power to give the exclusive right in order that it might be able to carry into effect the powers granted to it."

21. The courts below upheld the contention of the Defendant Company

that even if there was power to grant exclusive rights, no such grant was given as to those portions of the streets not actually physically occupied by the track, and line of the Plaintiffs' railway, and which might be necessary for the running of their cars and carriages. This finding was based upon clause one of the By-law and Contract, the words of that clause being expressed as follows :—

> "And such railway shall have the exclusive right to such portion of any street or streets as shall be occupied by the said railway."

It was contended on behalf of the Plaintiff Company that the word "occupied" there, was to be given a more extended meaning than its ordinary meaning, and was to refer to the whole width of the street, and that it was not merely physical occupation of a portion of the street that was intended. Mr. Justice Bain did not find it necessary to decide the point, but the judges of the court on appeal, agreed that physical occupation only was intended, and that there was no reason for extending the meaning of the word "occupied" in that clause so as to include the whole width of the street; and that if there was any ambiguity as to the meaning of the word it must be resolved as against the Plaintiffs under the rule usually applied to grants to such companies. The chief ground upon which the Plaintiff Company contended that the word was to be given a wider meaning than mere physical occupation, was that the same word occurred in clause 25 of the By-law, and the Plaintiffs claimed that in that clause 25 the word had a wider meaning than that of mere physical occupation, and that the whole By-law and Contract should be read together, and that the same meaning should be given to the word throughout the contract.

22. The contention of the Defendants is that there is nothing in the Contract to indicate that it was intended that anything except the physical occupation of the portion of the street was referred to by the word "occupied" and that its meaning in clause 1 of the By-law must be the same kind of occupation as that which is referred to in clause 9 of the Plaintiffs' Act of Incorporation (under which the By-law purports to be drawn) where the purposes and the extent of the occupation are defined as being such parts of the street :—

> "As may be required for the purpose of the railway track, the laying of their rails, and the running of their cars and carriages."

plainly referring to the actual extent of the street necessary for the carrying on of the business of the Company.

23. The Defendant Company claimed by their answer and at the hearing that if the City Council had power to give a monopoly, and if any such monopoly was actually given, that it was a monopoly only as to railways operated by animal power, and that a street railway operated by electricity was no breach of such monopoly. It is questionable in the first place as to whether electricity was one

of the powers contemplated by the Act of Incorporation of the Plaintiffs at the time of its passing, as electricity was not then known as a feasible motive power for street railways, or at the most was in an experimental stage as such. (See evidence of Record p.), and this contention of the Defendant Company involves the point that the Council of the City of Winnipeg, even if monopoly was intended to be granted, did not by the passing of the Plaintiffs' By-law and the entering into the Agreement in question, intend to grant away the exclusive right to operate street railways by all motive powers whether then known to be feasible or otherwise. The City of Winnipeg in 1890, by resolution of its Council, authorized the Plaintiffs to operate a portion of their line in the outskirts of the City, south of the Assiniboine River by electricity. That line is about three and one-half miles in extent. But north of the Assiniboine River, in what is the main portion and populous and business part of the City such permission had always been refused, and in the latter parts, being the parts where the Defendant Company's lines were afterwards built, the Plaintiffs have never had the right to operate by any motive power except animal power. The position of the Defendant Company with reference to this contention may be put shortly, thus: The City of Winnipeg, if monopoly was intended to be granted, gave the Plaintiffs the exclusive right to operate street railways by animal power only and the Defendant Company may be given the right to operate street railways by any other power than animal power, including electricity, and thus the City would not be guilty of a breach of the Agreement entered into with the Plaintiffs There is no monopoly in street railways given, but if at all, merely a monopoly in street railways operated by a certain kind of power, namely, animal power. Since the Courts below were able to find in favor of the Defendant Company upon the other two points as to the power of the Corporation, and as to the actual construction of the Contract, there has been no decision upon this defence.

24. If the By-law and Agreement be held to give the exclusive right claimed by the Plaintiffs, then they will not be enforced because of their extreme unreasonableness in the following respects:—

(*a*) The monopoly is to last forever. No matter how populous the City becomes, no railway is ever to be permitted except that of the Plaintiffs'. It is true that provision is made for the cessation of the monopoly through purchase of the railway by the City, but the provision is entirely worthless for two reasons:—

(1) Because the City has no power to purchase a railway; and, (2) because the price is to be fixed by the unanimous award of three arbitrators and one of them is to be selected by the Plaintiffs themselves.

(2) The service required is almost valueless. The intervals are to be "not

more than thirty minutes." The speed is to be "not more than six miles per hour;" there is no minimum. There is to be no forfeiture of privileges in case of their non exercise or improper exercise, nor any penalty whatever. There is to be no competition. There is no provision as to the character of the cars—even that they are to be closed and properly heated in winter time. One hundred years from now the City Council cannot permit any other company to lay a line upon any street in the City upon which the Plaintiffs have no line, no matter what service is offered and what amount can be got for the privilege if the Plaintiffs are willing to build upon their present terms, once every half hour and ten cents a trip.

25. Under clause 25 of the Plaintiffs' By-law corresponding with clause 27 of the Agreement executed under that By-law, the Plaintiffs claim that the City could not permit the Defendants to build lines of street railway on the streets on which the Plaintiffs had not built, until the Plaintiffs had been offered the option of constructing such proposed railways, and had not accepted same within two months. This argument affects the lines of Defendants built upon Central Avenue, 14th Street North, 10th Avenue North, 17th Avenue North and 24th Street North but does not affect the question of the right of the Defendant Company to build on Main Street and Portage Avenue. The Defendant Company's contentions with reference to this clause were (1) that it did not impose any restriction on the City in dealing with other companies, and (2) was merely intended to provide for a way of getting rid of any right of the Plaintiffs to build on those streets, but did not imply that other companies or persons should not have the right to build on those streets if the Council chose to permit rival lines, (3) that the City Council had no power to enter into such an agreement if the effect of same was to restrict the City from exercising the powers which they had under their Act of Incorporation and the clauses above quoted, of authorizing any line of street railway on the streets of the City. The Plaintiffs' contention was that they should be permitted to say after two months, whether they would accept the privilege or not, and that until after that time the City Council had bound themselves not to legislate as to other street railways on those streets. If there was no power to grant exclusive rights it seems certain that there was no power in the Council to agree to suspend its legislative and statutory powers for two months or any other period for the Plaintiffs' benefit. Another objection which may be urged against this clause, having the effect contended for by the Plaintiffs is, that the By-law in this respect is unreasonable and unfair. The provision is that if any other parties propose to construct street railways on streets not occupied by the Plaintiffs, then such right must be given to the Plaintiffs if they choose to accept same

thus absolutely removing from the City Council any discretion in the matter, and making the right to build depend upon any proposition which may be made by any irresponsible party for constructing street railways in the City. If the clause has the meaning contended for by the Plaintiffs, it provides for an agreement that the Council will not during the period of twenty years exercise any discretion as to the choice of persons or companies who are to be permitted to build street railways, and the clause is invalid for partiality and discrimination in favor of the Plaintiffs.

26. The Plaintiffs' alleged agreement had never any validity, for it is not based upon the By-law. The By-law provides that it

> "shall only come into force after an agreement based upon the conditions and provisions herein stipulated shall have been entered into and executed between the said Company and the said Corporation."

The agreement does not conform to the By-law in this, that the latter grants permission and privilege to the Plaintiff Company only, whereas by the agreement they are granted to the Plaintiff Company, "*their successors or assigns.*" This is no unimportant variation in an agreement which was to run forever, nor is it ever unimportant when the Company is one which is to render service to the public. There was no evidence of ratification of this agreement by the City.

27. Even if it were held that the Plaintiff Company has, by contract with the City, a grant of an exclusive right to use the streets for railway purposes, yet there are several reasons why an injunction should not issue against the Defendants:—

(*a*) Because the remedy could not be mutual. The Court has no power to compel the Plaintiffs to work the railway, and it is the settled practice of the Court to refuse specific performance of part of an agreement of which it cannot compel performance of the rest. Even if the Court could compel the Plaintiff Company to work the railway it could not insure its satisfactory operation, and at best only up to the very obsolete standard of the contract. Indictment for neglect would not lie.

(*b*) Because the Plaintiff Company have no sufficient *locus standi*, loss of profit is not sufficient. Substantial interference with their work is not pretended.

(*c*) The grantee of an exclusive right cannot sue a stranger for infringement.

(*d*) The laches and delay of the Plaintiffs is a complete bar. They were aware of all the Defendants' preparations and intentions (See Mr. Austin's evidence p.), as well as of the Defendants' Agreement with the City Council and their charter of incorporation. Nevertheless they stood by and allowed the contract to be made and the work to be largely completed before

any step was taken to assert their rights. The By-law providing for the Defendant's Agreement with the City is dated 1st February, 1892. Work was commenced on 31st May, 1892. The first route was completed and operation upon it was commenced 25th July, 1892. Work upon another route had been commenced when on the 27th July, 1892 the bill was filed. At this time $20,000 had been expended by the Defendants in the construction of their works. No application for interim injunction was made until the 22nd September, 1892; at which time the expenditure had increased to $60,000 When the application at length did come on to be heard, the Plaintiffs obtained its postponement until the hearing which took place 14th November, 1892 when the expenditure had amounted to $130,000. It may be that there is not here sufficient acquiescence to estop the Plaintiff altogether, but there is sufficient to induce the court to withold from them the extraordinary remedy of injunction.

The Respondents, The Winnipeg Electric Street Railway Company, submit that the Judgment appealed from is correct and should be affirmed for the following, among other

REASONS:

1. Because the Mayor and Council of the City of Winnipeg had no power under its Act of Incorporation or the Plaintiff's Act of Incorporation to grant a monopoly or exclusive privileges to the Plaintiffs, as such grant involved an agreement to refrain from exercising their proper corporate powers of legislation with reference to other tramways, as the interests of the City might require from time to time.

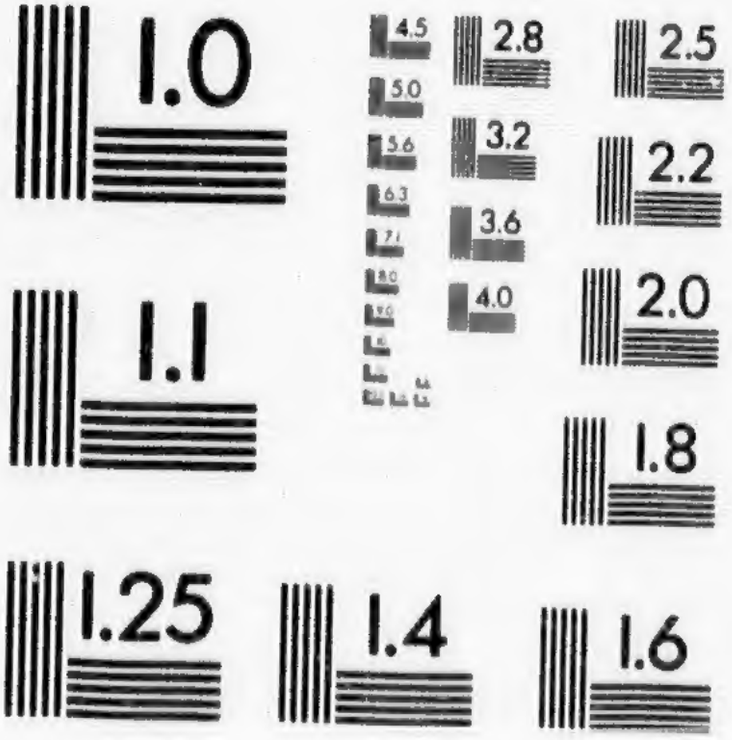
2. Because no such exclusive privileges were granted, or intended to be granted, by the terms of the By-Law 178 of the City of Winnipeg, or the Agreement with the Plaintiffs, except as to the parts of the streets actually occupied by the Plaintiffs' lines, and necessary for the laying of their rails and the running of their cars and carriages, and because the Plaintiffs' Agreement never was in force.

3. Because the grant to the Defendant Company of power to operate lines by electric power was no breach of any right of the Plaintiffs, they having by the terms of their By-Law and Contract, power to operate on the streets in question by animal power only, no other power having been authorized, in the portion of the City where the Defendant Company's lines are, and even if there was a monopoly as to tramways operated by animal power, the City still held ungranted the power to authorize electric tramways.

4. Because as to the Defendant Company's lines on streets on which the

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

Plaintiffs had no lines, there was no power in the City, or its Council, to pass Clause 25 of the Plaintiffs' By-Law, or give the Plaintiffs any preferential rights as against other Companies, such being an unauthorized restriction of the corporate powers of the City, and an interference with its legislative discretion as to granting similar powers to other Companies or persons.

5. Because clause 25 of the Plaintiffs' By-law did not give the Plaintiffs more power as to building lines on any street than Clause 1 of their By-law, the latter having given them ample power to build and operate lines on all streets, a privilege they had not availed themselves of as to the streets in question, and no new option was necessary.

6. Because the Defendant Company were expressly authorized by By-law 543 and the contract thereunder and their Act of Incorporation to construct and operate the tramway lines in question.

7. Because the Plaintiffs' had lost their alleged right to injunction by reason of their delay, and laches in commencing and prosecuting their suit, in the meantime allowing large expenditures to be made by Defendent Company in the construction of their lines.

8. Because in any case the alleged rights of the Plaintiffs are not such as can be enforced by injunction.

9. And for the reasons mentioned in the reasons of the four Judges appealed from.